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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
Oct. Term 1980

MARY ELLEN CRAWFORD, a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a ballot initiative known as Proposition 1, which explicitly classifies school desegregation matters adversely and differently from other racial matters and from other educational matters, is inconsistent with Hunter v. Erickson, 393 U.S. 385 (1969) and thus unconstitutional under the equal protection clause of the Fourteenth Amendment.

2. Whether Proposition I, whose purpose and effect were to terminate effective school desegregation in the Los Angeles Unified School District and whose historical context was the previous implementation of the school desegregation plan, is inconsistent with Reitman v. Mulkey, 387 U.S. 369 (1967) or Village of Arlington Heights v. Metropolitan Housing Development

Corporation, 429 U.S. 252 (1977), and thus unconstitutional under the equal protection clause of the Fourteenth Amendment.

3. Whether Proposition 1, which had the purpose and effect of terminating effective school desegregation within the Los Angeles Unified School District, deprived minority school children of their vested right, secured by a previous final judicial judgment, to a desegregated education in violation of the due process clause of the Fourteenth Amendment.*

---

* PARTIES: The petitioners, are the minority students attending the minority segregated schools in the Los Angeles School District.

Respondent is the Board of Education of the City of Los Angeles.

Intervenors are Bustop, a corporation; Better Education for Students Today (BEST), an unincorporated association; Robert Loveland and Mary Keipp; Charles Dreebin, Megan Belcher, Jessica Friedman, Danny Friedman, Jason Friedman and Integration Project, an unincorporated association; United Teachers/Los Angeles, an unincorporated association.

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PETITION FOR WRIT OF CERTIORARI
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OPINIONS BELOW

The opinion of the court below is reported at 113 Cal.App.3d 633, 170 Cal.Rptr. 495 (1980).

Other reported opinions in previous phases of the case are reported at 17 Cal.3d 280, 130 Cal.Rptr. 724, 551 P.2d 28 (1976); 69 Cal.App.3d 66, 137 Cal.Rptr. 793 (1977); 439 U.S. 1380 and 1384, 58 L.Ed.2d 88 and 92, 99 S.Ct. 40 and 44 (1978); ___ U.S. ___, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980).

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is December 19, 1980. Petition for rehearing was denied on January 14, 1981.

Petition for hearing in the California Supreme Court was denied on March 11, 1981.

By order dated June 1, 1981, Mr. Justice Rehnquist granted an extension of time to July 9, 1981 within which to petition for certiorari.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 USC 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

California Constitution, Article I, Section 7(a), as amended by Proposition 1 on November 6, 1979, states:

> ARTICLE 1. DECLARATION OF RIGHTS
>
> §7. Due process and equal protection; pupil school assignment and transportation
>
> (a) A person may not be deprived of life, liberty or property without due process of law or

denied equal protection of the laws; 1/ provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a

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1/ What follows is the amendment, Proposition 1.

court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in

> the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel and protecting the environment.

Section 1 of the Fourteenth Amendment to the United States Constitution states in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case presents the important question as to the constitutionality under the Fourteenth Amendment of Proposition 1 on the California Ballot of November 6, 1979, amending the California Constitution's equal protection clause, Article I, Section 7(a), concerning the desegregation of the minority segregated schools of the state. Specifically, the case involves the

desegregation of the minority segregated schools of the Los Angeles Unified School District which has been under a court order to desegregate those schools, but has not yet done so, since May 12, 1970.

The federal question sought to be reviewed was raised in the court of first instance, the Superior Court of the State of California for the County of Los Angeles, on December 19, 1979, by the petitioners herein in response to a motion by respondent to modify, pursuant to Proposition 1, desegregation orders of the Superior Court. The Superior Court did not decide the question, saying in its order of May 19, 1980:

> Petitioners in opposition seek to have the amendment to Article I, Section 7(a) declared unconstitutional. The mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions and the request for

such declaration is moot and will be denied.

The constitutional question was then raised before the Court of Appeal by respondent herein in its appeal from that May 19, 1980, order in its brief entitled "Appellant's Brief re Proposition 1," the heading on page 26 of which reads:

Proposition 1 is Constitutional

The constitutional question was likewise raised by petitioners herein before the Court of Appeal in their brief entitled "Reply of Respondents Crawford, et al to Board of Education's Brief on Proposition 1," Point I of which reads (pg. 8 of that brief):

> PROPOSITION 1 IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE EQUAL PROTECTION, DUE PROCESS AND SUPREMACY CLAUSES OF THE UNITED STATES CONSTITUTION

The Court of Appeal passed upon the federal question by holding Proposition 1

to be constitutional saying (Appx. A hereto, pp. 50A, 69A-70A):

> The remaining question is the federal constitutionality of a state constitutional amendment conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment.
>
> * * *
>
> We conclude that Proposition 1 does not violate the federal constitution and that its application to this cause is constitutional under the Fourteenth Amendment.

The California Supreme Court rendered no opinion nor made any statement in denying hearing.

On May 12, 1970, after a 7-1/2 month trial, at which it found and concluded that respondent Board of Education had maintained and was intentionally maintaining a racially segregated school district, the Superior Court adjudged that respondent Board was under a duty to "evolve and adopt a meaningful Master

Plan of Integration, a plan that will realistically work within a reasonable period of time, eliminate segregated schools and create integrated schools, an integrated unitary school system." The judgment provided that the Board present the plan to the Court on or before July 1, 1970.

Instead of complying with the judgment the Board appealed, resulting in the California Supreme Court affirming the judgment in its entirety save that portion which defined segregated schools in terms of fixed racial and ethnic percentages (Crawford v. Board of Education), 17 Cal.3d 280, 285 [1976]).

The California Supreme Court approved the trial court's conclusion that the school district was intentionally segregated[2/] but did not rest its

2/ "The findings in this case adequately support
(Footnote 2 continued on next page)

decision on that characterization because it "continue[d] to adhere to [its] conclusion in Jackson [v. Pasadena City School District, 59 Cal.2d 876, 382 P.2d 878 [1963]] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation, 'regardless of its cause.'" The Board did not appeal.

Following remand and during the hearings that were being held in the Superior Court on the development of a plan to comply with the 1970 Superior Court and 1976 State Supreme Court orders, school board members who were less hostile to compliance with the court orders were replaced by recall and election by members pledged to resist the desegregation. The rubric was

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2/ (CONT'D.)
the trial court's conclusion that the segregation in the defendant school district is de jure in nature." (17 Cal.3d at 285).

opposition to "forced busing."[3/]

On February 7, 1978, over the objection of petitioners here who protested that the mandates were not being complied with, the Superior Court allowed the start in September, 1978, of a plan presented by the Board after a rejection, as wholly unconstitutional, of an earlier plan. The Superior Court held that the second plan also did not comply with the mandate but allowed its implementation as an important first step toward eventual compliance because the plan offered promise for amendments and modifications. The court ordered such additions and for further hearings to be held thereon. The plan the trial court allowed to go into effect contained some modest assign-

3/ Although forced busing had been declared illegal in California by its Supreme Court in 1971. (San Francisco Unified School District v. Johnson, 3 Cal.3d 937, 479 P.2d 669).

ments for desegregation and desegregated somewhat some grades in a few minority segregated schools.

On November 6, 1979 during the hearings being held on the augmentation of the plan, Proposition 1 on the state's general election ballot was passed, 2-1. Its design was clearly to halt the desegregation that was going on in Los Angeles at the time and to prevent the enlargement of desegregation which appeared to be in the offing as well as to prevent "forced busing" in the other school districts in the state.

Almost immediately upon the passage of Proposition 1, the school board moved the trial court to be relieved of the little desegregation then going on and to be allowed to institute a so-called "voluntary" assignment system whereby, again, no minority segregated school

would be desegregated and where the burden of obtaining an integrated education would fall entirely on the victims of the segregation, the minority students and they alone. Petitioners here resisted the motion on the ground that Proposition 1, to the extent it allowed the result sought by the Board, was unconstitutional under the 14th Amendment to the United States Constitution. The Superior Court, as noted above, did not reach the constitutional issue. The trial court thereupon, after the hearings were concluded, and on default of the Board presenting a constitutionally acceptable desegregation plan that would comply with the 1970 and 1976 orders to desegregate the minority segregated schools, prepared its own plan.[4/] That

4/ The reasons the trial court rejected the plan the Board sought to implement by reason of Proposition 1 are explained in specific findings

(Footnote 4 continued on next page)

plan of the court, by its order of July 7, 1980, provided for somewhat more assignments for desegregation and desegregated some minority schools although it left untouched the most heavily segregated areas of the district.

On appeal, the Court of Appeal

4/ (CONT'D.)
by the court (CT 17538-39):

"30. That the plan of the respondents depends exclusively upon voluntary transfers of both white and minority children, requested and initiated by the parents of those children. That the respondent does not expect to desegregate minority schools by this plan, but to provide a desegregated experience for some minority children.

"31. That the history in this district of voluntary compliance with the mandate is one of failure in desegregating minority schools. That any success which may have been achieved is within its PWT program, which program is used exclusively by minority children [some 18,000 of them] to transfer on a daily basis from their minority schools to white schools, thus resulting in no desegregation of minority schools. That the history of magnet schools has also been one of failure to desegregate minority schools and has shown only limited promise in the creation of new desegregated schools.

"32. That the all-voluntary plan proposed by the respondent board holds no promise of meeting the mandate in the desegregation of minority schools."

reversed[5] the California Supreme Court and held the 1970 findings of the Superior Court insufficient to support the conclusion that the Board had engaged and was engaging in intentional segregation. Accordingly, the Court of Appeal held that the Superior Court had no right to have made the July 7 order which included assignments for desegregation. In so doing, it upheld the constitutionality of Proposition 1 which purported to deprive the California Courts of the effective power to require desegregation of California's segregated schools and retroactively overturned final desegregation orders, specifically that of Los Angeles, leaving over a quarter of a million minority youngsters, to say nothing of those in the past and yet to come, to a destiny of segregated

5/ This is not a typographical error.

education for their entire school careers.

Hence, this petition.

ARGUMENT AMPLIFYING THE REASONS FOR GRANTING WRIT

The decision of the California Court of Appeal below, upholding the constitutionality of Proposition Il, is in direct conflict with this Court's decisions in Hunter v. Erickson, 393 U.S. 385 (1969), Reitman v. Mulkey, 387 U.S. 367 (1969) and Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). The decision below also is in direct conflict with the decisions in the lower federal courts holding racial classifications unconstitutional under the equal protection clause of the Fourteenth Amendment. The decision below, depriving minority school children of their vested rights to a desegregated education, also

conflicts with basic principles embodied in the due process clause of the Fourteenth Amendment. Because of these conflicts, and because the decision below has allowed the will of the majority to subvert the rights of minorities by sanctioning the enactment of an unequal equal protection clause, this Court should grant this petition for a writ of certiorari.

I.

PROPOSITION 1 IS AN EXPLICIT RACIAL CLASSIFICATION VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

As we have explained, Proposition 1's purpose and effect were to terminate effective school desegregation within the Los Angeles Unified School District. The conditions existing prior to the adoption of Proposition 1 were those of school desegregation being accomplished.

The historical context is one of pre-existing school desegregation thwarted by Proposition 1. As such, Proposition 1 violates the equal protection clause of the Fourteenth Amendment in the same manner that an earlier proposition was found unconstitutional in Reitman v. Mulkey, 387 U.S. 369 (1967).

Here, however, the unconstitutionality of Proposition 1 need not rest even on Reitman. This is because "[h]ere, unlike Reitman, there [is] an explicitly racial classification treating racial housing [here, school desegregation] matters differently from other racial and housing [here, educational] matters." Hunter v. Erickson, 393 U.S. 385, 389 (1969).

A. By Treating School Desegregation Matters Differently From Other Racial Matters and From Other Educational Matters, Proposition 1 is Inconsistent with Hunter v. Erickson and Thus Unconstitutional Under the Fourteenth Amendment

Hunter v. Erickson, 393 U.S. 385 (1969), and its progeny control this case. As Circuit Judge Paul Hays wrote for a unanimous three-judge court more than a decade ago in Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971):

> "The principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." 318 F.Supp. at 718 (footnote omitted).

At issue in Hunter was §137 of the Akron City Charter, a popular referendum which had been adopted by a majority of the electorate. Section 137 effectively repealed Akron's fair housing ordinance, and made any future fair housing

ordinance ineffective unless adopted by the majority of the electorate. As this Court summarized in Hunter:

> "By adding §137 to its Charter, the City of Akron, which unquestionably wields state power, not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect. Section 137 thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." 393 U.S. at 389-390 (footnotes omitted).

Because §137 created "an explicitly racial classification treating racial housing matters differently from other racial and housing matters," 393 U.S. at 389, and because it was not sustained by a compelling state interest, the popular referendum was held unconstitutional.

The principle applied in Hunter is applicable not only to state eviscera-

tion of fair housing remedies but also to state evisceration of school desegregation remedies. Thus, in Lee v. Nyquist, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd., 402 U.S. 935 (1971), the Hunter principle was applied to a legislative enactment barring student assignment to achieve racial balance in the public schools. The state law, §3201(2) of the New York Education Law, prohibited appointed school boards, the State Regents, and the State Commissioner of Education "from assigning students, or establishing, reorganizing or maintaining school district, school zones or attendance units for the purpose of achieving racial equality in attendance." 318 F.Supp. at 712. Reviewing the constitutionality of this law, the three-judge court noted that the purpose of §3201(2) was to terminate the state officials' "policy

of eradicating de facto segregation." 318 F.Supp. at 716. But, in holding the state law unconstitutional, the court relied not on the purpose and effect of the law but only on the fact that the law was a racial classification no different from the referendum in Hunter:

> "Section 3201(2) . . . singles out for different treatment all plans which have as their purpose the assignment of students in order to alleviate racial imbalance. The Commissioner and local appointed officials are prohibited from acting in these matters only where racial criteria are involved. The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools. We can conceive of no more compelling case for the application of the Hunter principle." 318 F.Supp. at 719.

The Hunter principle was also applied by the Ninth Circuit in Seattle School District No. 1 v. State of Washington, 638 F.2d 1338 (9th Cir.

1980), where the court affirmed the unconstitutionality of a state referendum known as Initiative 350. Like the state law in Lee, Initiative 350 differentiated "student assignment for purposes of achieving racial balance from student assignment for any other significant reason." 633 F.2d at 1344 (footnote omitted). Irrelevant was the fact that Initiative 350 did not on its face mention racial assignment, because the referendum "achieve[d] the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance." 633 F.2d at 1343. Based on the Hunter principle, Initiative 350 was declared an unconstitutional racial classification.

Three aspects of Hunter, Lee, and

Seattle are especially significant. First, the form of the racial classification is irrelevant. In other words, a racial classification is a racial classification whether adopted as part of a governing charter through a popular referendum as in Hunter, whether enacted as a state law by a state legislature as in Lee, or whether adopted as a state law through a state-wide referendum as in Seattle.

Second, Hunter, Lee, and Seattle established that there is no compelling state interest which can justify such racial classifications. As this Court observed in Hunter, 'a public decision to move slowly in the delicate area of race relations emphasizes the impact and burden of [the racial classification], but does not justify it." 393 U.S. at 392. Indeed, public opposition to

racial reassignment has never been constitutionally recognized as a compelling state interest. See, e.g., Cooper v. Aaron, 358 U.S. 1, 16 (1958).

Finally, it was entirely irrelevant to the analysis in Hunter, Lee, and Seattle that the initial rights and remedies provided to the racial minorities -- before the racial classifications removed those rights and remedies -- were never in the first place required by the Fourteenth Amendment. In other words, the initial fair housing ordinance in Hunter and the initial efforts at remedying de facto school desegregation in Lee and Seattle were themselves not obligatory under the Fourteenth Amendment. Nonetheless, the racial classifications that eviscerated those rights and remedies were unconstitutional.

In the instant case, Proposition 1

cannot escape the racial classification analysis of Hunter, Lee and Seattle. Proposition 1 expressly addresses and curtails "pupil school assignment" and "pupil transportation" in the context of school desegregation. It does not at all address other racial matters. And it does not at all address other educational matters. Instead, through an explicit racial classification, Proposition 1 takes from racial minorities the school desegregation rights and remedies previously guaranteed under the California Constitution.6/

To paraphrase this Court in Hunter, Proposition 1 is unconstitutional under

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6/ It is of no moment that Proposition 1 uses language which purports to accomplish this result — with regard to school desegregation and only with regard to school desegregation — by incorporating the standards of the equal protection clause of the Fourteenth Amendment into the equal protection clause of the California Constitution. This is because the constitutional analysis under

(Footnote 6 continued on next page)

the Fourteenth Amendment, for it is an explicit racial classification treating racial desegregation matters differently from other racial and educational matters. Indeed, as Judge Ely pointed out in Seattle, 633 F.2d at 1344: "Unless this Court affirms the relevancy of the constitutional analysis applied in Hunter and Lee to this case, the guarantee of equal protection of the laws will become a hollow shell."

B. Because of its Immediate Objective, its Ultimate Effect, its Historical Context, and the Conditions Existing Prior to its Adoption, Proposition 1 is Inconsistent with Reitman v. Mulkey and Village of Arlington Heights and Thus Unconstitutional Under the Fourteenth Amendment.

6/ (CONT'D.)
Hunter, Lee, and Seattle focuses on the existence of a racial classification. And, as pointed out in the text at p.25 , supra, it was irrelevant in Hunter, Lee and Seattle that the rights and remedies initially provided the racial minorities — and later eviscerated — were broader than was ever required by the Fourteenth Amendment. Proposition 1 created for California what surely must be prohibited under the Amendment: an unequal equal protection clause.

Preceded by blatant, overt legislation openly discriminatory against California's minorities, including decreeing separate schools for them[7] Proposition 1 is but the latest in a series of efforts by the majority of the state, by seemingly neutral and facially inocuous enactments, to discriminate against racial minorities. (See, e.g., Oyama v. California, 332 U.S. 633 [1948]; Reitman v. Mulkey, supra; San Francisco Unified School District v. Johnson, supra; Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 530 P.2d 605 [1979]).

In Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265-66, 270 n.21 (1977), this Court held that a plaintiff alleging an equal protection violation need only show that discriminatory

7/ E.g. former California Education Code Section 8003 and 8004 were not repealed until 1947.

purpose was a motivating factor in the official act complained of and that the government entity has failed to show that the provision would have been enacted "even had the impermissible purpose not been considered."[8/]

8/ /Because the petitioners need not prove that a segregative purpose was either the sole or the dominant reason for the passage of Proposition 1, the appellate court erred in ruling that the legitimate purposes listed in Proposition 1 immunize it from constitutional attack. Even if those alleged purposes were among the reasons for enacting Proposition 1 — a suggestion refuted by the proposition's history, the ballot argument, the statements of its proponents, and its effects — they do not rule out segregative intent as a determinative factor. Since discriminatory purpose is seldom openly admitted, the recital of benign purposes cannot block further investigation. Arlington Heights requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Id. at 266. See United States v. Texas Education Agency, 579 F.2d 910, 913-14 (5th Cir. 1978) (Austin IV), cert.denied, 443 U.S. 915 (1979), rejecting the notion that benign motives preclude intentional discrimination; United States v. Texas, 498 F.Supp. 1356, 1363 (E.D. Tex. 1980): "Public pronouncements of good faith by state authorities in no way obviate an unconstitutional intent to discriminate."

The Court of Appeal erred in focusing on the voters' motives to insulate Proposition 1. Motive is not the same as intent or purpose.

(Footnote 8 continued on next page)

In recognition of the fact that discriminatory purposes are most often disguised, Arlington Heights suggested various factors as guidelines for discerning whether a particular action is infused in any way with discriminatory purpose. 429 U.S. at 266-268.

In Reitman v. Mulkey, 387 U.S. 369, 373 (1967), this Court approved similar analysis in terms of "immediate objective," "ultimate effect," historical context and the conditions existing prior to its enactment."

The evidence is overwhelming that

8/ (CONT'D.)
Cf., 1 Witkin, California Crimes, §54 (1963): "[A] person may intend to steal property, or to injure or kill another, and will be guilty of the crime regardless of his motive (e.g., need, avarice, revenge, jealousy, fear, etc.)."

Moreover, since the legislature placed Proposition 1 on the ballot, its intent is also subject to scrutiny. If either the legislature or the voters were motivated in part by discriminatory purpose, the burden shifted to the Board to show that the proposition would have been enacted even without that purpose. This has not been shown.

Proposition 1 is infected with an improper discriminatory purpose and that it meets the tests of both Reitman and Arlington Heights. In fact, the burdens to be placed upon minority children are barely disguised. When viewed in light of the history of racial discrimination in California,[9/] the arguments raised by the proponents of Proposition 1 in the election debate, public understanding in the media and the unambiguous pronouncements of the California courts concerning the urgent need to eradicate the continuing harm of segregated public schools in the State of California, there can be no doubt that Proposition 1 falls afoul of Reitman and Arlington Heights. See, Comment, California's Anti-Busing Amendment: A Perspective on the Now Unequal Equal Protection

9/ See Appendix, p. 94A, et seq. for examples.

Clause, 10 Golden Gate U.L.Rev. 611, 665-681 (1980); Comment, Proposition 1 and Federal Protection of State Constitutional Rights, 75 Nw.U.L.Rev. 685, 730-733 (1980).

The reality of the burdens imposed by Proposition 1 on minority children is sufficient to establish a constitutional violation. Before the passage of Proposition 1 all persons in the State of California were entitled to the same equal protection under the laws under Article 1, Section 7 of the California Constitution and to effective remedies for the violation of those rights. Proposition 1 carves out a discrete exception to California's Equal Protection Clause for minority public school students seeking relief from the harmful effects of a segregated school system. For this class of minority children

alone, relief under the California Equal Protection Clause will be tied forever to the vagaries of changing federal decisional law, as that law may be applied to the facts existing whenever a Proposition 1 petitioner seeks to challenge an existing desegregation order or judgment. All other equal protection plaintiffs in California may look to the more expansive rights and remedies secured by the California Constitution. Robins v. Pruneyard Shopping Center, 23 Cal.3d 899, 903-04, 592 P.2d 314, (1979), aff'd, __U.S.__, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980); People v. Pettingill, 21 Cal.3d 231, 247, 578 P.2d 108, 145 Cal.Rptr. 861 (1978); Serrano v. Priest, 18 Cal.3d 728, 762, 557 P.2d 929, (1976); Bustop Inc. v. Board of Education, 439 U.S. 1380 (1978). Only minority students seeking freedom from segregation are not

the beneficiaries of the California Constitution which provides, or did until the passage of Proposition 1, that "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Cal. Const., Art. I, §24.

As is clearly shown by the media response, (see Appendix, p. 103A-104A) Proposition 1 was designed not with abstract constitutional theory in mind, but with the purpose of imposing enormous litigation burdens on a select class of racial minorities, the minority plaintiffs in this case. Proposition 1 is a direct response to an unbroken chain of California cases which refuse to permit recalcitrant school boards to place additional litigation hurdles in the path of minority children seeking their right to an equal education. See,

e.g., Crawford, 17 Cal.3d at 300 ("the litigative task involved in such an effort [distinguishing de jure from de facto segregation] would be an enormous one, imposing tremendous burdens on representatives of minorities . . . ."). It is precisely the imposition of those enormous litigation obstacles on minority children which the proponents of Proposition 1 sought to manufacture as a last ditch attempt to evade the desegregation of the Los Angeles public schools which is required in this case.

The imposition of such unequal litigation burdens upon minority children seeking to alleviate the harms of school segregation are analogous to -- but even more onerous than -- the special electoral burdens the Akron amendment placed upon persons seeking the passage of ordinances barring discrimination in housing. See,

Comment, supra, 10 Golden Gate U.L.Rev. at 642-45; 75 Nw.U.L.Rev. at 724.

Apart from the imposition of litigation burdens, Proposition 1 cruelly deprives minority children of their rights, secure since Jackson v. Pasadena City School District, 59 Cal.2d 876, 881, 382 P.2d 878 (1963), and specifically adjudicated in this case, 17 Cal.3d 280, to be free from the harmful effects of segregation regardless of its cause. These harmful effects form the fundamental basis for the principles of California Equal Protection law which Proposition 1 seeks to dismantle. Crawford, 17 Cal.3d at 301. The fact of this continuing harm was clearly known to the proponents of Proposition 1; yet they deliberately chose to impose these onerous burdens on minority children alone.

The superficial racial neutrality of Proposition 1 cannot insulate it from equal protection attack. This Court in North Carolina Board of Education v. Swann, supra, 402 U.S. 45-46, invalidated an apparently neutral, color-blind prohibition against student assignment on the basis of race because, read against the background of segregation, it "would render illusory the promise of Brown v. Board of Education . . . ." See also, Lane v. Wilson, 307 U.S. 268, 275, 59 S.Ct. 872, 83 L.Ed. 1281 (1939) (the law condemns "sophisticated as well as simple-minded modes of discrimination").

The language of the Proposition "is an obvious pretext for racial discrimination."[10/] See, Personnel Administrator

10/ Far from "specifically embracing" the Fourteenth Amendment, as the appellate court ruled,

(Footnote 10 continued on next page)

v. Feeney, 442 U.S. 256, 272 (1979), citing, e.g., Yick Wo v. Hopkins, 118

10/ (CONT'D.)
Appendix at 63A, Proposition 1 incorporates only the narrow segment of it that might serve to prevent effective desegregation in Los Angeles. Instead of disadvantaging all Californians alike, Proposition 1 carves out a single exception that affects a single class of disfavored litigants. The amendment of the entire California equal protection clause to conform to the federal one, though regrettable, would presumably be constitutional, except insofar as it would disturb rights previously vested under separate state equal protection guarantees. Such action would inflict equal deprivations upon all persons in the state.

Similarly, California might conform its present restrictive search and seizure laws to the less restrictive search and seizure provisions of the Fourth Amendment. The state could not, however, remove its search and seizure protections from one unpopular class of criminal defendants only, leaving the California provisions intact for other defendants -- especially not if the disfavored class, though described in neutral language, was in fact based upon race. Such state actions would violate the Fourteenth Amendment for the same reasons that Proposition 1 violates it.

The self-serving purposes alleged in Proposition 1 as the reasons for its enactment are no more than a transparent attempt to mislead the courts. Similar interests have never been found sufficient to sustain racial discrimination. See, e.g., Norwood v. Harrison, 413 U.S. 455, 466 (1973) (good educational intentions); Watson v. City of Memphis, 373 U.S. 526, 537 (1963)

(Footnote 10 continued on next page)

U.S. 356 (1886), and Gomillion v. Lightfoot, 364 U.S. 339 (1960). School desegregation plaintiffs today are as inevitably racial and ethnic minority children as owners of prohibited wooden laundries in San Francisco in 1885 were Chinese, see, Yick Wo, or as voters removed from the redrawn city limits of Tuskegee, Alabama in 1960 were Negro, see Gomillion. Proposition 1 "embraces" the Fourteenth Amendment only insofar as necessary to devastate the rights of minority children to a desegregated

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10/ (CONT'D.)
(expense); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (public disorder); Weaver v. Palmer Bros., 270 U.S. 402, 415 (1926) (inconvenience).

Moreover, the proponents of Proposition 1 do not find these interests compelling when they tout "voluntary" busing. Buses carrying minority students to predominantly white schools use the same amount of fuel per mile and endanger the busriders' safety to the same degree as buses carrying children of both races in a two-way desegregation plan. The difference is that a "voluntary" plan places the burden predominantly upon minority students and does not desegregate minority segregated schools.

education. For everyone else -- indeed, even for minority children seeking to vindicate some other, less unpopular constitutional right -- the California equal protection guarantees remain intact.

The other factors referred to in Arlington Heights further establish a constitutional violation. Proposition 1, when viewed in the context of the long history of racial discrimination in public education in California, and in light of the unmistakable purpose of its proponents of blocking the desegregation efforts mandated by the California courts, is clearly infused with improper discriminatory purpose. More specifically, Proposition 1 is a response to the proceedings in this case.[11/]

11/ For an outline, see Comment, California's Anti-Busing Amendment, supra, 10 Golden Gate U.L.Rev. at 665-681. E.g., the proponents of the Proposition in their ballot argument stated: "Proposition 1 does everything the people of

(Footnote 11 continued on next page)

In Reitman v. Mulkey, 387 U.S. 369, (1967), this Court was faced with a

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11/ (CONT'D.)
California may legally do to stop court-ordered forced busing in Los Angeles . . . ." Media coverage reiterated this characterization, thus conveying to the public the understanding that Proposition 1 would indeed hinder desegregation in Los Angeles. See Appendix, pp. 103A-104A.

The sequence of events and legislative history reinforce the plain intent of Proposition 1. After this case was filed in 1963, the plaintiffs repeatedly asked the Board to begin voluntary desegregation. Crawford, 17 Cal.3d at 287. The Board refused, even though some desegregation measures were "unquestionably feasible." Id. at 307. Only after its unsuccessful appeal did the Board formulate its first desegregation plan, which the trial court found constitutionally inadequate. (Order of July 5, 1977). Meanwhile, on June 20, 1977, Senate Constitutional Amendment 48 -- an anti-busing proposal -- was introduced in the Legislature. Comment, 10 Golden Gate U.L.Rev. at 674 n. 307. After the Board presented a second desegregation plan, Plan II, with some mandatory assignments for desegregation, State Senator Alan Robbins began trying to place an anti-busing constitutional amendment on the ballot as an initiative. In January 1978, however, SCA 48 was rejected by an Assembly Committee.

Over the months that followed, anti-desegregation groups began a campaign to recall school board president Howard Miller. In November 1978, court-appointed desegregation experts recommended a metropolitan desegregation plan, reaching suburban districts as well as Los Angeles. In December, Senate Constitutional

(Footnote 11 continued on next page)

similar attempt to subvert the rights of minority persons to equal protection

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11 / (CONT'D.)
Amendment 2 — which would become Proposition 1 - was introduced in the Legislature. It was subsequently approved, despite a warning from the Legislative Counsel that the measure could not constitutionally "extinguish any rights existing at the time of its adoption to the extent that such a result would amount to de jure segregation. . . . ." In June 1979, after the successful recall of board president Miller, the Legislature voted to bypass regular election procedures and hold a special election on Proposition 1 in fall 1979.

When this Court's decisions in Columbus Board of Education v. Penick, 443 U.S. 449 (1979) and Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979) (Dayton II), in July 1979 appeared to diminish Proposition 1's prospects for halting school desegregation in Los Angeles, Senator Robbins introduced Senate Bill 1244, designed to increase plaintiffs' burden of proof in desegregation cases in California. (The Legislature passed it, but Governor Brown vetoed it. See Comment, supra, at 666 n. 251.) On October 30, 1979, the California Attorney General and Secretary of State issued procedurally "highly unusual" statements 'clarifying' the meaning of Proposition 1. See Comment at 680. On November 6, 1979, the voters approved Proposition 1. It contained the extraordinary feature that all courts in the state must give Proposition 1 proceedings precedence "over all other civil actions."

This sequence of events, along with the long history of racial discrimination in California, the overt pronouncements of Proposition 1's legislative proponents, and the departure

(Footnote 11 continued on next page)

under the law. Reitman involved an attempt by the voters of California to invalidate earlier statutes prohibiting private discrimination in housing sales and rental by the passage of Proposition 14 in 1964. Proposition 14, like Proposition 1, was worded with deceptive neutrality:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.

However, the Court pierced these neutral terms to expose the discriminatory purpose which motivated the passage of

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11/ (CONT'D.)
from the norm, both substantively and procedurally, which led up to the adoption of, and are contained in, the enactment, see Comment, supra, at 677-678, leaves no doubt that Proposition 1 was segregative in intent. The requirements of Arlington Heights and Reitman have been fulfilled.

Proposition 14.

In affirming the decision of the California Supreme Court (64 Cal.2d 529 [1966]) striking down Proposition 14 on equal protection grounds, this Court approved the California court's judgment that:

> [T]he State had taken affirmative action designed to make private discrimination legally possible. Section 26 was said to have changed the situation from one in which discrimination was restricted "to one wherein it is encouraged, within the meaning of the cited decision"; §26 was legislative action "which authorized private discrimination" and made the State "at least a partner in the instant act of discrimination . . . ." 387 U.S. at 375-376 (emphasis added).

Similarly, by the passage of Proposition 1, the State became a partner in the efforts to thwart desegregation. By prohibiting the only remedies that might effectively desegregate, Proposition 1 "involves the state in the preservation of such segregation." San Francisco

Unified School District v. Johnson, 3 Cal.3d 933, 946, 958 (1971). School boards wishing to avoid their duty to desegregate their minority segregated schools may now invoke express constitutional authority to do so. Proposition 1 is not a neutral enactment.[12/]

The historical context," "ultimate effect" and "immediate objective" of Proposition 1 present an even stronger example of purposeful discrimination than the circumstances presented in Reitman. The history of racial

12/ Indeed, by creating a state-wide rigid neighborhood assignment policy Proposition 1 has bestowed "government force upon . . . private decisions to impose racial discrimination," (Johnson, supra, 3 Cal.3d at 953). This Court has recognized the effect school assignments have upon the creation of segregated neighborhoods. Columbus Board of Education v. Penick, 443 U.S. 449, 465, n.13 (1979); Keyes v. School District No. 1, 413 U.S. 189, 202-3 (1973); Swann, supra, 402 U.S. at 20-22. See, also, Adams v. United States, 620 F.2d 1277, 1291-92 (8th Cir. 1980), cert.denied 49 U.S.L.W. 3246 (Oct. 6, 1980). See generally, Kushner, Apartheid in America.

discrimination and segregation in the California public school system is as long as the history of housing discrimination relied upon in Reitman. See Appendix, p. 97A. Just as the proponents of Proposition 14 sought freedom from state anti-discrimination measures -- in effect, a right to discriminate -- the proponents of Proposition 1 seek the right to maintain a segregated public school system.

Seattle School District No. 1 v. Washington, supra, 473 F.Supp. 996 (W.D. Wash. 1979), affirmed on other grounds, 638 F.2d 1338 (9th Cir. 1980) represents the appropriate synthesis of the pertinent federal case law applicable to measures such as Proposition 1. In Seattle School District No. 1 a federal district court struck down an anti-busing initiative (Initiative 350), similar in

purpose and effect to Proposition 1, which arose in a context remarkably similar to the within case.

The Court in Seattle School District No. 1 found that Initiative 350 constituted a racial classification in that it enumerated a variety of bases upon which student assignments could be made but conspicuously omitted the assignment of students for racial balancing purposes. Thus, although Initiative 350 did not contain any explicit racial classifications, the Court looked beyond the superficial neutrality of its terms and based its decision on the obvious effect and purpose of the statute. 473 F.Supp. at 1012-1013. The obvious effect of Initiative 350 was that only minority children would bear the burden of its prohibitions.

The court also found that the

passage of Initiative 350 was infused with purposeful discrimination when analyzed within the framework suggested by Arlington Heights, supra. As the Court explained:

> Beyond question the informed voters of the State, and the voters in general in Seattle, were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students. Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students. 473 F.Supp. at 1015.

The Court emphasized the special significance of recognizing the reality of this obvious burden on minority children within the analytical framework suggested by Arlington Heights. In particular, where the adverse consequences of a law upon a minority are

inevitable "a strong inference that the adverse effects are desired can reasonably be drawn." Id.; citing Personnel Administrator of Massv. Feeney, 442 U.S. 256, 279 n. 25 (1979).

The Court next reviewed the historical context of Initiative 350 and found that it was clearly adopted with the specific purpose of overriding the Seattle School Board's decision to attain a racial balance in Seattle schools through pupil assignments. The Court again explained:

> One must assume therefore that the voters, in adopting the initiative, intended to accomplish the very purpose for which the initiative was designed and intended therefore the disproportionate racial impact which its implementation will have. Id. at 1015.
>
> * * *
>
> The historical backgound and sequence of events leading up to the adoption of the initiative reveals a whole series of lawsuits

> and a recall election, the objective of which was to prevent the racial balancing of Seattle schools by means of mandatory student assignments.[13/] It reveals, too, that the adoption of the plan of racial balancing by the Seattle School Board was the event which gave rise to the thought of a statewide initiative as a means of thwarting that decision. Id. at 1015-1016.

The court also found that Initiative 350's sudden intrusion of the public into areas which had traditionally been the autonomous function of school boards -- i.e., pupil assignments -- was another indicator of discriminatory purpose. Id. at 1016.

The case stressed the constitutional invalidity of Initiative 350's interference with attempts to promote racial balance in the public schools, without

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13/ Los Angeles had its recall election of the Board President and its law suits for the same objective. CT 14166-14197; Bustop v. Superior Court, 439 U.S. 1380 and 1384 (1978); Board of Education of the City of Los Angeles v. Superior Court, ___ U.S. ___, 65 L.Ed.2d 1166, 101 S.Ct. 21 (1980).

regard to the de facto/de jure distinction. 473 F.Supp. at 1013. See also, Lee v. Nyquist, supra, 318 F.Supp. 710 (W.D.N.Y. 1970) aff'd, 402 U.S. 935 (1971).

See also, School Committee of Springfield v. Board of Education, 366 Mass. 315, 319 N.E.2d 427 (1974), cert.denied 421 U.S. 947 (1975). In that case, after a court had ordered Springfield to desegregate, the Massachusetts Legislature passed an act which prevented the State Board of Education from ordering pupil assignments or transportation for desegregation. The power of the local school boards, there called "School Committees," to employ such methods was not impaired. Thus, the Massachusetts enactment was virtually identical with Proposition 1 except there the state agency that was shorn of power was the

State Board of Education. Here it is the courts. The Supreme Judicial Court of Massachusetts held the legislation unconstitutional under the Fourteenth Amendment, saying (319 N.E.2d at 435, 436):

> . . . [w]hen viewed in the "historical context" of the Springfield situation . . . it becomes easy to comprehend that any attempt under c.636 to prevent the operation of the Task Force plan would constitute a significant retreat from the progress toward desegregation that had been made under the pre-amendment plan. And the cases make clear that even where steps toward desegregation are made voluntarily rather than pursuant to constitutional mandate any subsequent state action which would cause a return of the pre-existing segregation would itself be an act of de jure segregation. This is especially true where, as in this case, there is a court decree ordering the implementation of such plans.

To like effect is this Court in Dayton Board of Education v. Brinkman, 433 U.S. 406, 413 (1977). To paraphrase: "Proposition 1 [has] acted to undo operative

regulations affecting the assignment of pupils . . ."

II.

PROPOSITION 1, WHICH HAS THE PURPOSE AND EFFECT OF TERMINATING EFFECTIVE SCHOOL DESEGREGATION WITHIN THE LOS ANGELES UNIFIED SCHOOL DISTRICT, VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT BY RETROACTIVELY DIVESTING THE MINORITY SCHOOL CHILDREN PETITIONERS OF THEIR PREVIOUSLY ADJUDICATED VESTED RIGHT TO A DESEGREGATED EDUCATION

Because Proposition 1 destroys the only class of remedies which can effectively desegregate the Los Angeles public schools, it renders the petitioners' 1970 judgment, affirmed by the California Supreme Court in 1976, an empty promise.[14/]

14/ Petitioners do not claim "a vested rght to require other pupils to be assigned to public schools on the basis of race." See Court of Appeal Opinion, Appendix at 66A. They do claim a vested right to their final judgment and to all remedies necessary to effectuate that judgment.

(Footnote 14 continued on next page)

Proposition 1 improperly attempts to carve out an exception to the constitutional principle of finality of judgments, an exception applicable only to minority students seeking a desegregated education. Under this banner, the Los Angeles Board of Education seeks to retroactively deprive the Board's minority children of vested rights secured by their final judgment more than a decade ago.

Proposition 1 provides that "any interested person," at any time, as a matter of constitutional right may compel

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14/ (CONT'D.)
The Legislative Counsel of the State, in two opinions provided on January 9 and March 21, 1979, to State Sens. Paul Carpenter and Alan Robbins, respectively, warned that Proposition 1 "could not by its operation extinguish any existing rights to the extent that such a result would amount to de jure segregation, as . . . where it would require 'resegregation' in the face of a currently active plan of desegregation." See Comment, supra, 10 Golden Gate U.L.Rev. at 677-78 & n. 336. That, of course, is precisely the situation in Los Angeles.

a court, upon application, to reopen final judgments, retry issues once decided, and modify those decisions by applying current law "to the facts which exist at the time of such modification." It is a prescription for endless litigation, inviting ambiguously identified "interested person(s)," perhaps anyone (see California's broad taxpayer statute, CCP §526a; Comment, 10 Golden Gate U.L.Rev. at 629) with a right to upset judgments "whenever rendered," as indeed the court below has done in this very case. There is nothing in Proposition 1 to prevent multiple applications by "interested persons," ad infinitum, year after year, or with any and every change in the federal law, or whenever the spirit of segregation moves them. Upon each application, minority children will be forced to re-establish their right

to relief upon new facts and new law existing "at the time of such modification."

It has long been the law that "it is not within the power of the legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases." McCullough v. Commonwealth of Va., 172 U.S. 102, 123-134, 19 S.Ct. 134, 43 L.Ed. 383 (1898).15/

15/ See, 49 C.J.S. Judgments, §2, pg. 27, referring to a judgment as a vested right. For a general survey of Supreme Court cases dealing with retroactive legislation see Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv.L.Rev. 692 (1960) — "the traditional principle invoked in determining the constitutionality of retroactive legislation is that a statute may not abrogate 'vested rights.'" Id. at 696.

In attempting to divest plaintiffs of their vested rights secured by their judgment, Proposition 1 undermines far more than just a particular equitable remedy -- it derogates the substantive right itself which petitioners have won in their prior judgment. See Goldberg, The Administration's Anti-Busing Proposals: Politics Makes Bad Law, 67 Nw.U.L. Rev. 319, 377 (1972), observing, "Segregation injury is so intolerable that the right to non-segregated schools is the right to them now. Thus the remedy merges into the right. Any suspension of the remedy is a suspension of the right itself."

Proposition 1, of course, not merely suspends but forever denies the remedies necessary to effect desegregation to a trial court seeking to rectify school segregation regardless of cause pursuant

to the California Constitutional requirement. Jackson v. Pasadena City Board of Education, 59 Cal.2d 876 [1963]. If no Fourteenth Amendment violation is shown, student reassignment and transportation may be used only if a school board decides on its own to adopt those techinques. This illusory deference to the petitioners' state constitutional rights should be seen in its true colors--giving the key to desegregation to the Board, which has time and again refused to desegregate the Los Angeles schools in the 18 years since Jackson, see Crawford, 17 Cal.3d at 287, 288, 307, is tantamount to locking the door and throwing the key away.

The Court of Appeal wrongly insisted that Proposition 1 removes merely one among an "arsenal of remedies" which remain available to the trial court "to

alleviate unintended, nonpurposeful segregation" Appendix at 56A. But there are no other effective techniques which will desegregate minority segregated schools in Los Angeles.[16/] The California Supreme Court, referring to desegregation methods in Crawford, 17 Cal.3d at 305, specified the following:

> the redrawing of neighborhood attendance zones, the "pairing" or "clustering" of schools, the establishment of "magnet schools," and the implementation of "satellite zoning."

Every one of these techniques requires the use of "pupil school assignment or pupil transportation,' which is forbidden to the trial court by Proposition 1.

The Court of Appeal erroneously reasoned that because a student could not "claim a federal constitutional

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16/ See footnote 4, supra, page 13 .

right to attend a magnet school and a federal constitutional right to require a school district to operate one," Appendix at 68A, there is similarly no constitutional right to the mere "remedy" of "pupil school assignment or pupil transportation." Both the premise and the analogy are mistaken. If magnet schools were a remedy necessary to effectuate the constitutional right to desegregation of minority schools, which they do not now appear to be, their withdrawal from the trial court's power to order would violate the Fourteenth Amendment just as Proposition 1 does.

Petitioners do not argue that they have a constitutional right to any particular remedies. They do contend that they are entitled to effective remedies under the circumstances. This Court has often so held. E.g., North Carolina

Board of Education v. Swann, 402 U.S. 43 (1971); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). See also Wright v. Council of City of Emporia, 407 U.S. 451 (1972), holding that under the circumstances present in that case, the plaintiffs had a constitutional right to forbid the state, county, and city to carve a new city school district out of the existing county district. Of course, no such constitutional right would have existed except for the crucial fact that creation of the new school district would have seriously impeded the constitutionally required dismantling of the county's dual school system. Cf. Keyes . School District No. 1, 413 U.S. 189, 213-14 (1973).

By like token Proposition 1 purports to take away petitioners' rights

to desegregation.

Decisions which have seemingly allowed retroactive application of legislation which removed a prior remedy have almost universally involved cases in which the judgment was not final, and have generally followed the reasoning that "what Congress giveth, Congress can taketh away." E.g., Mirabal v. General Motors Acceptance Corporation, 537 F.2d 871, 876 (7th Cir. 1976).

However, where the judgment is final, the courts have not allowed a remedy to be removed retroactively. See, e.g., Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811 (D.C. Cir. 1974). See also, Hodges v. Snyder, 261 U.S. 600, 603 (1923); Greene v. United States, 376 U.S. 149 (1964). "Where a statute operates immediately to cut off an existing remedy and by

retroactive application, deprives a person of a vested right, it is ordinarily invalid because it conflicts with the due process clauses of the federal and state constitutions." California Employment Stabilization Commission v. Payne, 31 Cal.2d 210, 215, 187 P.2d 702 (1947). Further,

> Notwithstanding a statute, by its terms purports to deal with a matter of remedy only, it is void and inapplicable if its operation will result in divesting or impairing vested rights. 16 C.J.S. Constitutional Law, §256, p. 1251.

Citing, inter alia, Duke Power Co. v. South Carolina Tax Commission, 81 F.2d 517 (4th Cir. 1936) cert.denied 298 U.S. 669 (1936).

In taking away from plaintiffs their effective opportunity for a desegrated education at least without litigating all over again, Proposition 1

has in effect taken away from the minority youngsters in Los Angeles who are required to attend minority segregated schools, their 1970 and 1976 judgments.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

MARY ELLEN CRAWFORD, etc., et al., Plaintiffs and Respondents, v. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Defendant and Appellant.	2 CIVIL NO. 60000 (Super. Ct. No. C822854)
BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MARY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association, Intervenors.	COURT OF APPEAL-SECOND DIST. F I L E D DEC 19 1980 CLAY ROBBINS, JR. Clerk Deputy Clerk

APPEAL from an order of the Superior Court of Los Angeles County. Hon. Paul W. Egly, Judge. Vacated and remanded.

APPENDIX A

McCutchen, Black, Verleger & Shea, G. William Shea, Peter W. James, David T. Peterson, Michael M. Johnson, and Jerry F. Halverson, Attorneys at Law, for Appellant.

Fred Okrand, Mark D. Rosenbaum, Mary Ellen Gale, Antonio Rodriguez, Halvor T. Miller, Manning & Reynolds, Shockley, Duff & Hart-Nibbrig, Attorneys at Law, and Paul Hoffman, Of Counsel, for Respondents.

Cliff Fridkis, Esq., for Intervenor Bustop.

THE COURT:*

The issues are whether the amendment to article I, section 7(a), of the California Constitution, adopted November 6, 1979, on pupil school assignment and pupil transportation (Proposition 1) violates the United States Constitution, and, if it does not, whether the remedial order entered by the superior court on July 7, 1980, in the Los Angeles School District desegregation cause entitled Crawford

v. Board of Education contravenes article I, section 7(a) of the California Constitution.

The school board (Board) of the Los Angeles Unified School District (District) has appealed to this court from orders of the Los Angeles Superior Court entered May 19, 1980, and July 7, 1980. The May 19 order declined to rule on the constitutionality of Proposition 1, and held that in any event the amendment had no application to this cause. The July 7 order was one of a series of remedial orders entered pursuant to a judgment granting a writ of mandate, a judgment originally issued in 1970 by the Los Angeles Superior Court. In 1976 the California Supreme Court modified and affirmed the judgment granting the writ (Crawford v. Board of Education, 17 Cal.3d 280), and remanded the cause to the trial court to

require the Board to prepare a "reasonably feasible plan" to alleviate the harmful consequences of racial segregation in the schools within the District. On remand, the Board in response to the writ submitted to the superior court a plan which focused on pairing and clustering of selected schools, creation of magnet schools, and a plan of voluntary 'busing' for students with parental consent. The major thrust of the Board's plan was to encourage voluntary desegregation.

The trial judge (not the judge who originally tried the cause) made it clear early in the proceedings that nothingshort of a plan involving large-scale mandatory reassignment of pupils on a racial and ethnic basis would be satisfactory. At the commencement of the school year in the fall of 1978 he brought about the implementation of such

a plan. After a year's experience with the plan all parties were dissatisfied with the plan, and were agreed that it had failed to achieve its objective.

On November 6, 1979, the voters of the state approved Proposition 1, an initiative measure which amended article I, section 7(a), of the California Constitution.[1/] The effect of the

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1/ ARTICLE I. DECLARATION OF RIGHTS

§7. Due process and equal protection; pupil school assignment and transportation

(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official

(Footnote continued on next page)

1/ (Cont'd)

any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

. . . . .
. . . . .

(Amended Nov. 6, 1979.)

amendment was to prohibit state courts, in desegregation cases, from ordering school boards to mandatorily reassign and transport pupils on the basis of

race, except to remedy a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution under circumstances which would authorize a federal court under federal decisional law to issue such an order. The amendment further provided that any previously issued court order which contained a mandatory reassignment provision could be modified by proper application to a court having jurisdiction over the matter, unless modification was precluded by the United States Constitution.

The Board applied to the superior court to modify the plan then if effect by eliminating all mandatory reassignment and "busing" of pupils. On May 19, 1980, the court denied the application on the ground that the original trial court had found the Board guilty of de jure segregation in violation of the

Fourteenth Amendment to the United States Constitution. On July 7, 1980, the superior court issued a new order, which, though somewhat different from its 1978 order, required substantial mandatory reassignment and transportation of pupils in the District. We have expedited the appeals from these two orders in accordance with the recommendation of the California Supreme Court.

We consider first the appeal from the May 19 order, for the reason that if the newly enacted amendment to article I, section 7(a) of the California Constitution precluded the trial court from ordering mandatory reassignment of pupils, the appeal on the merits of the July 7, order would become moot. Plaintiffs contend that the original findings of the trial court in this

cause found the Board guilty of de jure segregation in violation of the Fourteenth Amendment to the United States Constitution, thereby making inapplicable to this cause the limitation imposed by the amendment to the California Constitution, and that in any event the amendment to the California Constitution brought about by Proposition 1 is itself unconstitutional and violative of the United States Constitution.

I.

Both California and federal law pertaining to segregation in the public schools have a common origin in the United States Supreme Court decision of Brown v. Board of Education (1954) 347 U.S. 483. But thereafter California and federal law followed parallel but somewhat different courses. As we will develop, infra, the clear impact of

Proposition 1 is to bring one aspect of California law into conformity with federal law.

The United States Supreme Court decisions, starting with Brown v. Board of Education, supra, have examined the problem of segregation in the public schools of the various states in the light of the equal protection clause of the United States Constitution. The essential holding of Brown was that state constitutional and statutory provisions requiring segregation of white and black children in public schools on the basis of race deny black children the equal protection of the law guaranteed by the Fourteenth Amendment and are therefore void. In rejecting the long-standing separate-but-equal rule of Plessy v. Ferguson (1896) 163 U.S. 537, the court in Brown

held that separate educational facilities are inherently unequal for the reason that the mere fact of legalized segregation generates a feeling of inferiority in the black students. (p. 494.) In essence, psychological trauma was at the heart of the Brown decision. Thurgood Marshall, the then counsel of the National Association for the Advancement of Colored People, in arguing before the Supreme Court in Brown urged only "that the state-imposed racial segregation be taken off . . . . If school officials were enjoined from enforcing segregation, then I think whatever district lines . . . are drawn on a natural basis, without regard to race or color, then I think that nobody would have any complaint." (Argument: The Oral Argument Before the Supreme Court in

Brown v. Board of Education of Topeka, 1951-1955, pp. 47-49 (L. Friedman ed. 1969).)

The objective of the Brown decision, and of the cases later implementing it, was to dismantle officially-imposed dual school systems. Once a dual system has been dismantled and a unitary system established, a school board is under no affirmative federal duty to adjust attendance to comport with shifting and changing neighborhood racial patterns, so long as the changes are attributable to private conduct. (Pasadena City Board of Education v. Spangler (1976) 427 U.S. 424.) The scope of federal constitutional law in this field was clarified over the ensuing years in a series of decisions rendered by the United State Supreme Court at a time subsequent to the

findings and conclusions of the original trial judge herein in 1970.

Clarification began with Swann v. Charlotte-Mecklenburg Board of Education (1971) 402 U.S. 1, a southern school desegregation case concerning remedies available to a federal court to desegregate a legally segregated school system. Two of its points are relevant here. No particular degree of racial balance or mix is required to desegregate a school. (p. 24.) Absent a constitutional violation a federal court has no authority to assign students to schools on the basis of race. (p. 28.)

The next development came in Keyes v. School District No. 1 (1973) 413 U.S. 189, a case of deliberate, intentional racial segregation in a western city. The court declared that to establish unlawful segregation in violation of the

Fourteenth Amendment "plaintiffs must prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action . . . [consisting of] an unconstitutional policy of deliberate racial segregation . . ." (p. 198.) De jure segregation, said the court, comprehends purpose or intent to segregate. (p. 208; italics in original.)

Thereafter followed the decision in Washington v. Davis (1976) 426 U.S. 229, a case involving claimed racial discrimination in police officer tests. In discussing the Fourteenth Amendment's prohibition against official discrimination on the basis of race, the court declared that the discrimination must be purposeful. In respect to school desegregation it said:

> "The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of de jure segregation is 'a current condition of segregation resulting from intentional state action.' Keyes v. School Dist. No. 1, 413 U.S. 189, 205 (1973). 'The differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.'" (p. 240; italics in original.)

Next came Pasadena City Board of Education v. Spangler (1976) 427 U.S. 424, a case involving termination of an existing desegregation plan. The original plan had established a racially neutral school system, said the court, and from that point on the power of the

district court to order assignment of pupils to schools on the basis of race came to an end, even though subsequent population shifts had brought about a degree of resegregation. Absent a constitutional violation there is no basis for judicial assignment of pupils on a racial basis. (p. 434.)

In Arlington Heights v. Metro. Housing Corp. (1977) 429 U.S. 252, where racially discriminatory zoning was charged, the court again noted that proof of racially discriminatory intent or purpose was required to show a violation of the equal protection clause of the Fourteenth Amendment. (p. 265.)

Thereafter, in Dayton Board of Education v. Brinkman (1977) 433 U.S. 406 (Dayton I), a school desegregation case, the court once more noted that racial isolation by itself "is not a

violation of the Fourteenth Amendment in the absence of a showing that this condition resulted from intentionally segregative actions." (p. 413.) District courts may exercise power over school districts only on the basis of a constitutional violation which results from action by a school board which is intended to, and does in fact, discriminate against minorities. (p. 420.) The same theme appears in Milliken v. Bradley (1977) 433 U.S. 267 (Milliken II), another northern school desegregation case, where the court noted that "the Court has consistently held that the Constitution is not violated by racial imbalance in the schools, without more [citations]. An order contemplating the 'substantive constitutional right [to a] particular degree of racial balance or mixing' is therefore infirm

as a matter of law." (p. 280.)

Most recently, in Columbus Board of Education v. Penick (1979) 443 U.S. 449, the court again observed that the conduct prohibited to school boards is intentional segregation. Plaintiffs must prove that school officials intended to segregate, said the court. "[D]isparate impact and foreseeable consequences, without more, do not establish a constitutional violation." (p. 464.) And in the companion case of Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II), at page 536, footnote 9, the court said: "We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination . . . ." (Italics ours.)

The foregoing decisions of the United States Supreme Court clearly identify constitutional violations of the Fourteenth Amendment as instances which involve intentional segregative state action taken with discriminatory purpose. In more familiar terms we can describe this intent as specific intent to discriminate. Only such a violation authorizes a federal court to give orders to a local school board on the conduct of school business. A correlative of this rule is that racial isolation which has resulted from causes other than intentional discrimination does not constitute a violation of the Fourteenth Amendment. In sum, the federal Constitution does not require integration, it only prohibits state-compelled segregation. (Swann v. Charlotte-Mecklenburg Board of Education

(1971) supra, 402 U.S. 1.) This subsequently-developed frame of reference for addressing claims of the denial of equal protection of the laws by reason of racial imbalance in public school is a natural extension of the rationale of Brown v. Board of Education, supra, in that it is intentional or purposeful segregation which produces feelings of inferiority in minority students and the consequent damaging psychological effects.

With the scope of federal law in mind, we analyze the situation as it existed in the District in 1970 at the time the trial court entered its original findings of fact and conclusions of law, a time prior to the clarification we have just discussed of the scope of the Fourteenth Amendment in school desegregation cases. The

trial court's findings and conclusions in substance asserted and deduced the following:

The Los Angeles Board of Education operates some 562 schools with 650,000 students in grades from kindergarten through twelfth grade in an area of 711 square miles.

In 1968 the racial and ethnic composition of the students was

53.6 percent white,

22.6 percent Negro,

20 percent Hispanic, and

3.8 percent Oriental and other.[2/]

2/ In October 1980 the composition of the student population was

White	23.7 percent
Black	23.3 percent
Hispanic	45.3 percent
Oriental & other	7.7 percent.

The number of white pupils in grades K-3 had fallen to 16.1 percent.

In 1966 the bulk of the District's schools were either majority white, majority Hispanic, or majority Negro. In 1966, 1967, and 1968 fourteen new schools were opened, each of which contained a student population which was either majority white or majority Negro. The Board "knew, or in the exercise of reasonable care should have known, at the time of the selection and purchase of the sites . . . [that these] schools and each of them would upon its opening be racially imbalanced and either Negro segregated or minority segregated or white segregated."

From 1966 to 1968 the number of minority segregated schools in the district increased. In 1968 the bulk of minority pupils attended schools having well above 50 percent combined minority enrollment, and the bulk of white

pupils attended schools having well above 50 percent white enrollment.

In 1970, the trial court found that substantial segregation existed in the District in that a number of schools met the trial court's definition of a segregated school -- a school with "substantially more than 49 percent of minorities, or any one thereof, or substantially more than 50 percentwhites." At that point the racial and ethnic composition of the students in the District was 53.6 percent white, and 46.4 combined minorities.

The Board caused this factual segregation, the court deduced:

> By mandating neighborhood schools;
>
> By site selection;
>
> By mandating school attendance areas and boundaries;
>
> By adopting transfer and

transportation policies ineffective for integration.

Subsequent to 1963, said the court, none of the school sites or school attendance boundaries selected by the Board was designed to effectuate desegregation or integration.

The court also found, without any specifics, that plant, teachers, physical facilities, and curriculum at the Board's minority schools were in fact of poorer quality than plant, teachers, physical facilities, and curriculum at its predominantly white schools, that minority schools were more crowded than white schools.

The court then concluded that the Board had segregated, de jure, its students through the following policies, practices, and omissions:

Adoption of policies of site selection and neighborhood schools without regard to desegregation or integration.

Establishment of attendance areas and boundaries without regard to its duty to create racially balanced schools and to eliminate segregation. Board practices included assignment of pupils by geographic area and adoption of feeder policies without regard to existing racial imbalance.

Establishment of transfer and transportation policies of which socio-economic disadvantaged students could not take advantage and which failed to provide free transporation for pupils

given permits to transfer. As a consequence the socio-economic disadvantged student was forced to attend a segregated neighborhood school. Open enrollment, said the court, was not a policy to correct racial imbalance but merely a tool of which disadvantaged pupils could not avail themselves.

Restriction to surplus funds of expenditures to create racial balance and provide compensatory educational programs for minorities.

The court asserted that in terms of educational discrimination there is no difference between de jure and de facto segregated schools. It is not true, said the court, "that the Federal Constitution only requires integrated education . . . if the segregation . . . is of a de jure nature." (Finding V.6.) It is virtually impossible, said the

court, for neighborhood schools which are in fact segregated to have only de facto segregation. (Conclusion VII.)

There was no finding by the trial court that the Board ever had a policy or program which denied admission to any school or required attendance at any school on the basis of race. Nor was there any finding that the Board ever gerrymandered attendance zones to create or preserve segregated schools.

Patently, the trial court in 1970 took the view that the federal Constitution required elimination of school segregation, regardless of its cause and irrespective of the existence of state action intended with discriminatory purpose to bring about segregation. On this basic premise the trial court deduced the existence of de jure segregation from such neutral acts as

maintenance of a neighborhood school system, siting of schools in the geographic center of their need, assignment of pupils to neighborhood schools, and failure to provide free transportation for open transfers. Having found a federal constitutional violation, the trial court then declared that a pupil has no right to choose which public school he will attend (V.19(v)), and that the Board has an affirmative duty to provide equal educational opportunity by compelling its pupils to attend schools on the basis of their race or color. (V.19(iii).)

As noted earlier, the trial court made these deductions and inferences in 1970 at a time it did not have the benefit of the more recent decisions of the United States Supreme Court.

In the intervening period that court has made it clear that the federal Constitution only authorizes court assignment and transportation of pupils on the basis of race when there has been state action which intentionally segregated with discriminatory purpose. If no such state action has occurred, elimination or alleviation of racial segregation which has resulted from economic causes and from neighborhood residential patterns is a matter left to local school authorities. In the early development of the law implementing Brown v. Board of Education, supra (1954) 347 U.S. 483, the phrases de jure and de facto were used as a kind of shorthand to distinguish between segregation mandated by statute and segregation which had resulted from the operation of

demographic, economic, and other voluntary factors. The concept of unlawful segregation, however, rapidly outgrew segregation by statute and came to encompass all state activity designed to bring about racial segregation, whether facially neutral or not. (Cf. Yick Wo v. Hopkins (1886) 118 U.S. 356.) Unlawful segregation in violation of the Fourteenth Amendment was not limited to segregation by statute, regulation, or ordinance, but extended to acts and practices of a school board consciously adopted with discriminatory purpose to create or perpetrate school segregation. Such acts as establishment of attendance zones, use of mobile classroom units, and use of optional zones, when done with discriminatory purpose and segregative intent, can amount to unlawful

segregation. "We emphasize," said the United States Surpeme Court, "that the differentiating factor between de jure segregation and so-called de facto segregation to which we referred in Swann is purpose or intent to segregate." (Keyes v. School District No. 1 (1973) supra, 413 U.S. 189, at p. 208; italics in original. As a result of this and subsequent cases de jure segregation was more accurately identified as purposeful segregation, it was uncoupled from state statutory law, and it was recoupled to state practices. Unconstitutional segregation became precisely defined as intentional, purposeful segregation, one which contained invidious discriminatory purpose. (Arlington Heights v. Metro. Housing Corp. (1977) supra, 429 U.S. 252, 265, 266.) In recent school

desegregation cases the labels de facto and de jure have fallen into desuetude and no longer appear to be in general use in United States Supreme Court opinions. (Columbus Board of Education v. Penick (1979) 443 U.S. 449; Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II).) With the advent of the recent, more precise identification of unconstitutional segregation, the terms de jure and de facto segregation appear to have outlived their usefulness, and a federal constitutional violation of the Fourteenth Amendment in a school desegregation cause is now accurately identified as state action taken with specific segregative intent and discriminatory purpose.

When the 1970 findings of the trial court are reviewed in the light of the

correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to de jure segregation in violation of the Fourteenth Amendment.

The essence of the trial court's findings is synthesized in the following paragraph:

> "Board had, and knew that it had, the power and the duty specially imposed by law upon it, though denied by it: To adopt school assignment policies that would incorporate other than geographical criteria, i.e., policies that would rectify the existing racial imbalances and that would create or tend to create racial balance and integration; to select school sites for that aim, purpose and end; to readjust attendance

> zones and areas and to select school sites to meet and overcome the effect of population movement. It knew, or should have reasonably know, of the population movements within its District. Board did not execute or perform these or any of those powers or perform those or any of those duties specially imposed by law upon it." (Italics ours; Finding IV.36.)

But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements. "That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause." (Washington v. Davis (1976) 426 U.S. 229, at p. 250.) And, as the court said in Dayton Board of Education v. Brinkman (1977) 433 U.S. 406, 413, (Dayton I), "The finding that the pupil population in the various Dayton schools is not homogeneous, standing by itself,

is not a violation of the Fourteenth Amendment . . ." When the trial court at bench concluded in 1970 that such a duty was required by federal law, the trial court clearly erred as a matter of law. Since the trial court's characterization of the Board's action as de jure segregation was a conclusion of law rather than a finding of fact, we are not bound by it. (Morrison v. State Board of Education (1969) 1 Cal.3d 214, 238; Hinman v. Westinghouse Elec. Co. (1970) 2 Cal.3d 956, 963.)

In sum, no federal violation of law was established by the 1970 findings, and the trial court's identification of the then existing racial segregation within the Los Angelesschool system as de jure segregation was true only in a Pickwickian sense, and was not true at all in the sense of federal law.

Because there was no evidence of acts done with specific segregative intent and discriminatory purpose, there was no federal constitutional violation -- regardless of the terminology used by the court.

One further element which bears tangentially on the question of intentional segregation with discriminatory purpose is the trial court's finding that the plant, teachers, physical facilities, and curriculum of minority schools were of poorer quality than those of predominantly white schools and that overcrowding in minority schools was greater than in white schools. This finding, however, did not assert that the lower quality of minority schools resulted from intentional segregation with discriminatory purpose but merely concluded that the Board knew or should

have known of the differential in quality between the two sets of schools. Absent some specific intent on the part of the Board to maintain inferior minority schools in order to perpetrate racial segregation, its delinquency in this respect raises separate issues which are curable by separate remedies. If older shcools in central districts are run-down and overcrowded and have not received the extra maintenance owed to them by reason of their age, and if senior teachers prefer to teach in suburban schools rather than in central schools, the Board must take positive action to equalize school facilities and equalize the quality of teaching throughout its several schools. Such has been the law in California for many years, most conspicuously set out in Serrano v. Priest (1971) 5 Cal.3d 584.

The court there observed that in instances of unequal expenditures for schools the discrimination is one based on wealth and not on race. (p. 604.) So here, the problem of unequal facilities is not directly connected with the problem of racial segregation. The problem of differential quality among schools is not solved by assignment of pupils to particular schools on the basis of race, but is solved by allocation of extra money and assignment of senior teachers to the poorer schools. The two problems frequently parallel one another but they are distinct and different problems. Only the problem of racial and ethnic segregation is directly involved in the cause at bench.

When on appeal this cause reached the California Supreme Court, Crawford

v. Board of Education (1976) 17 Cal.3d 280, that court squarely based its substantial affirmance of the trial court on the state constitutional ground of equal protection of the laws, determining that under state law the Board had a constitutional duty to alleviate segregation in the schools regardless of cause. The existence of segregated schools in the District, coupled with the Board's failure to take reasonably feasible steps to desegregate its schools, said the court, constituted a sufficient basis to sustain the trial court's order.

The Calfiornia Supreme Court noted and agreed with the trial court's characterization of the segregation as de jure in nature, but it also noted that whether school districts have an obligation under the federal

Constitution to eliminate segregation regardless of cause was an open question and, therefore, it rested its decision on state constitutional grounds. The court then declared that because segregation existed in the schools of the District and the Board had failed to undertake reasonably feasible steps to desegregate its schools, under the California Constitution the Board must be required to take "reasonably feasible steps to alleviate segregation." The trial court could compel the Board to prepare and implement a plan to alleviate segregation and the harmful effects of segregation in the District's schools. The past decade, said the court has produced literally scores of alternative administrative techniques which may be used to facilitate school desegregation.

The court was mindful of the many problems faced by a school district as large and geographically widespread as the District in attempting to desegregate hundreds of schools at various grade levels. Consequently, the court repeatedly emphasized that the Board's obligation was to take "reasonable and feasible steps" to alleviate segregation where it existed. The Board ws not, and is not, said the court, obliged to achieve absolute racial balance in all schools according to the demographics of the entire District. The court eschewed any attempt to define a "desegregated" school in terms of specific percentages, and in that respect it modified the original judgment of the trial court, which had declared that any school with substantially more than 49 percent minorities or subtantially more than

50 percent white was a segregated school. The court also said: "[I]n a school district in which 'minority' students significantly outnumber 'majority' students, a school whose racial composition might in some other district make it a 'segregated school' may not warrant that legal characterization." (Crawford, p. 304, fn. 16.)

That, of course, is the existing situation in the District, where white students are now a minority in that they comprise 23.7 percent of the total student population and 16.1 percent of grades K-3. Yet for the purpose of applying the legal principles related to school segregation, whites are still designated as the "majority," and segregation is viewed in terms of the minorities, or any one of them, being

isolated from whites.[3/]

In anticipation of the provisions of a specific remedial desegregation plan the California Supreme Court first pointed out that no set racial or ethnic percentages were required as a matter of constitutional law or could be established for a particular school in terms of the District's student population. Per-

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3/ That approach appears to be a hangover from the historic situation in some areas in the country which produced the background against which the decision in Brown v. Board of Education, supra, was rendered.

The wisdom of, or the need to, perpetuate that approach here is questionable since, when considered in terms of the ethnic composition of the Los Angeles Unified School District, it appears to denigrate the dignity and capability of the minority students. In effect, it implies that ethnic "minority" children, even when they constitute a numerical majority and thus do not suffer the psychological trauma of deliberate isolation, cannot achieve best results except in the presence of a token number of white students.

centages of various racial or ethnic groups could vary, even significantly, in different schools. The court referred to the scores of administrative techniques for facilitating the desegregation of school systems, including rezoning, (integrative gerrymandering) pairing, clustering, magnet schools, teacher patterns, opening new schools, closing old ones, and free transportation for optional transfer. "Busing," declared the court, is not a constitutional end in itself, but simply one potential tool which may be utilized to satisfy a school district's constitutional obligation. In some circumstances it will provide an appropriate and useful element in a desegregation plan; in others its costs in financial and educational terms will render its use inadvisable. Continuing,

the court opined ". . . so long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress [4/] . . . we do not believe the judiciary should intervene in the . . . process . . . reliance on the judgment of local school boards in choosing between alternative desegregation strategies holds society's best hope for the formulation and implementation of desegregation plans which will actually achieve the ultimate constitutional objective of providing minority students with

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4/ We interpret that phrase to mean meaningful progress in light of present conditions. A genuine opportunity to show such progress under a plan of its own has not yet been afforded the Board.

the equal opportunities potentially available from an integrated education." (Crawford, supra, at pp. 305-306.)

From the foregoing recital of the cause and of the United States Supreme Court desegregation decisions we conclude that the racial imbalance and segregation which existed in many schools in the District and the Board's actions in relation thereto did not constitute a violation of the equal protection clause of the Fourteenth Amendment as interpreted by the United States Supreme Court, in that racial imbalance and segregation did not result from Board acts performed with segregative intent and discriminatory purpose. It follows that federal courts would not be authorized under federal decisional law to require pupil school assignment or transportation by race

to remedy the imbalance. Thus article 1, section 7(a), of the California Constitution, as it now reads, operates to prohibit the trial court from ordering assignment and transportation of pupils on the basis or race unless this section of the California Constitution itself violates the Fourteenth Amendment to the United States Constitution.

II.

The remaining question is the federal constitutionality of a state constitutional amendment conforming state court use of mandatory assignment and transportation of pupils on the basis of race to that authorized for the federal courts under the Fourteenth Amendment.

California law on the subject of school desegregation has evolved from the opinion of the California Supreme Court in Jackson v. Pasadena City School Dist. (1963) 59 Cal.2d 876. That case involved a demurrer to a complaint which alleged that the Pasadena City School District had gerrymandered its school attendance boundaries to perpetuate racial segregation in certain schools. The court, relying on Brown v. Board of Education, supra (1954) 347 U.S. 483, reasserted the proposition that inten

tional segregation by race in the public schools denies minority students the equal protection of the laws. The issue in Jackson was the use by the Pasadena school board of school boundaries designed to perpetuate racial segregation, an allegation which, if true, amounted to intentional segregation with discriminatory purpose in violation of the Fourteenth Amendment. The court, observing that racial imbalance in California schools is usually caused by economic factors and housing patterns rather than by intentional segregation imposed by school authorities, concluded that even in the absence of officially caused or officially perpetuated segregation, a school board has a duty to affirmatively address the problem of racial imbalance. The court, however, was careful to point out that in performing that duty ". . .

consideration must be given to the various factors in each case, including the practical necessities of governmental operation . . . the degree of racial imbalance in the particular school . . . the difficulty and effectiveness of revising school boundaries . . . and the availability of other facilities to which students can be transferred." (Jackson v. Pasadena City School Dist., supra, at p. 882.)

Jackson was followed by San Francisco Unified School Dist. v. Johnson (1971) 3 Cal.3d 937, which interpreted Jackson, supra, as imposing on California school boards an affirmative duty to attempt to alleviate racial imbalance or racial isolation.

When the cause at bench, Crawford v. Board of Education (1976) 17 Cal.3d 280, came before the California Supreme

Court, state law on this subject was formally severed from federal law, and school boards were placed under an affirmative duty to undertake reasonably feasible steps to alleviate racial segregation in public schools regardless of the cause of the segregation. The existence of the duty was derived both from state decisional law (Jackson, supra, and Johnson, supra) and from the equal protection clause in article I, section 7(a), of the California Constitution. (Crawford, pp. 297, 302.) The cause was then remanded to the trial court with instructions to supervise the preparation and implementation of a reasonably feasible desegregation plan. The trial court was ordered to proceed on the basis of state law, and to utilize such of the "literally scores" (pp. 286, 305) of desegregation techniques as might

provide reasonably feasible means for desegregation. The California Supreme Court identified "busing" as merely one of the potential tools that might be utilized.

Subsequent to remand but before the trial court made its definitive order of July 7, 1980, article I, section 7(a), of the California Constitution was amended to remove "busing" (pupil school assignment and pupil transportation) from the arsenal of techniques available to a state court to alleviate racial school segregation caused by economic, geographic, and demographic factors and not by intentional segregation with discriminatory purpose. The posture of the cause and the position of those connected with it then became as follows:

The Board remains subject to its constitutional duty under state law to

undertake reasonably feasible steps to alleviate school segregation regardless of cause.

In carrying out its duty the Board may utilize any or all desegregation techniqeus, including pupil assignment and pupil transportation.

The Board is not subject to any federal obligation for violation of the Fourteenth Amendment.

The trial court is under a duty to supervise the preparation and implementation of a reasonably feasible desegregation plan. In the absence of a Board plan that provides meaningful progress, the trial court is authorized to implement a desegregation plan that may utilize all available desegregation techniques except that of pupil school as signment and pupil transportation.

Thus the effect of the constitu-

tional amendment is to withdraw one desegregative technique from the state court's arsenal of remedies available to alleviate unintended, non-purposeful segregation, but to leave all other available techniques intact.

An amendment which produces such a posture, plaintiffs assert, itself amounts to a violation of the equal protection clause of the federal Constitution, and Proposition 1 is either unconstitutional in its entirety or unconstitutional as applied to this cause. To support their assertion that Proposition 1 is contrary to the Fourteenth Amendment plaintiffs advance three arguments: (1) Proposition 1 removes a previously given state right, (2) it reflects intent to segregate with discriminatory purpose, and (3) it retroactively divests plaintiffs of adjudicated rights.[5/]

5/ SEE NEXT PAGE.

1. Removal of a previously given

5/ Plaintiffs also argue that Proposition 1 was improperly enacted, because the voters were not notified that it effectively amended sections of the California Constitution other than article I, section 7(a), because its title was misleading, and because it violated the single subject requirement. Amador Valley Joint Union High Sch. Dist. v. State Board of Equalization (1978) 22 Cal.3d 208, disposes of each of these arguments. That cause dealt with Proposition 13, an initiative which "change[d] the previous system of real property taxation and tax procedure by imposing important limitations upon the assessment and taxing powers of state and local governments." (p. 218.) The court rejected comparable challenges to Proposition 13 and held "that an initiative measure will not violate the single-subject requirement if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other." (p. 230.) The court noted Proposition 13 consisted of four major elements which it found "reasonably germane to, and functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief." (p. 230.) The elements of Proposition 1 are likewise reasonably germane to, and functionally related to, the common underlying purpose of elimination of court-ordered pupil reassignment or transportation unless required to remedy a Fourteenth Amendment violation or unless voluntarily undertaken. (See also, Fair Political Practices Comm. v. Superior Court (1979) 25 Cal.3d 33, cert.denied, 444 U.S. 1049 (1980).)

state right. On this point the keystone in plaintiffs' argument is Reitman v. Mulkey (1967) 387 U.S. 369. That cause involved a California initiative constitutional measure which repealed acts of the legislature which had prohibited private discrimination in residential housing. But more was involved than removal of a previous state right given to tenants not to be the subject of private discrimination. The United States Supreme Court interpreted the new constitutional provision as not merely repealing existing law prohibiting private discrimination, but as state action authorizing private racial discrimination in the housing market as basic policy, which in itself amounted to a violation of the Fourteenth Amendment. Under such circumstances the California constitutional initiative could not

survive the Fourteenth Amendment. Proposition 1 does not, of course, create a right to discriminate and does not change any substantive law of rights; it merely removes court-ordered pupil school assignment and transportation as a remedy available to cure state-proscribed racial imbalance in public schools.

Plaintiffs also rely on Hunter v. Erickson (1969) 393 U.S. 385, as authority or the invalidity of Proposition 1. There, an Akron, Ohio, charter amendment required that city ordinances dealing with discrimination on the basis of race, color, religion, national origin, or ancestry in the area of housing must be approved by a majority of voters at a general or regular election. Other ordinances, including ordinances dealing with other forms of discrimnation, would become effective thirty days after pas

sage by the city counsel. [sic] The United States Supreme Court noted that the Akron charter amendment "was an explicitly racial classification treating racial housing matters differently from other racial and housing matters." (p. 389.) This discrimination on the basis of race, religion, or ancestry violated the Fourteenth Amendment "because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, . . ." (p. 391.)

At bench, however, and unlike the Akron charter amendment, Proposition 1 embraces the protection of the Fourteenth Amendment and does not seek to violate it.

If a state is not under a federal duty to adopt a particular act in the first place (such as rectification of

racial imbalance in its schools which has resulted from population shifts, cf. Pasadena Board of Education v. Spangler (1976) 427 U.S. 424) recission of the act cannot be unconstitutional. See Dayton Board of Education v. Brinkman (1977) 433 U.S. 406, 413-414 (Dayton I), and Dayton Board of Education v. Brinkman (1979) 443 U.S. 526 (Dayton II), where at page 531, footnote 5, the court said:

> "Racial imbalance, we noted in Dayton I, is not per se a constitutional violation, and recission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment.)"

The notion that California could not conform its constitutional right of equal protection of the laws to that guaranteed by the federal Constitution appeared startling to Justice Rehnquist,

who wrote in this case:

> "'Turning to the argument that Proposition 1 violates the 14th Amendment of the U.S. Constitution, inasmuch as it merely limits California courts to what the federal courts can do under the federal constitution, it is indeed difficult to accept the contention that by limiting a state court's jurisdiction to that of the federal courts, there is somehow a violation of [the] federal constitution.'" (Board of Education of City of Los Angeles v. Superior Court of California (1980) 49 U.S.Law Week 3163.)

At oral argument plaintiffs' counsel candidly took the position that if, for example, California should recede from its present restrictive laws on the scope of permissible search and seizure to make them conform to the less stringent restrictions on search and seizure required under the federal Constitution, such California action would violate the Fourteenth Amendment. In effect, California's presently restrictive laws on search and

seizure could never be relaxed, either by state or federal action. On this point we note our basic disagreement with counsel, and we conclude that as a matter of federal constitutional law California can conform its constitutional protection of rights in this and other areas to those given under the United States Constitution, even though the specific protection under the California Constitution might have previously exceeded that under the federal Constitution.

In short, we do not believe a state constitutional amendment can be said to violate the Fourteenth Amendment by specifically embracing it.

2. Improper discriminatory purpose. The argument here is that Proposition 1 was passed with segregative intent and discriminatory purpose. A sufficient answer may be found in the

constitutional amendment itself, which declares the amendment is necessary to make most effective use of the limited resources available for public education, to maximize educational opportunities, to protect the health and safety of pupils, to enhance the ability of parents to participate in the educational process, and to prevent the waste of scarce fuel resources. We think it pure speculation to suppose that voters who supported Proposition 1's restrictions on mandatory school assignment by race of children outside their home areas were motivated by specific intent to effect racial segregation and by discriminatory purpose. Finally, we also believe the voters who adopted this contitutional amendment could have been motivated without segregative intent and discriminatory purpose by the considerations set out by Justice

Powell in Estes v. Metropolitan Branches, Dallas NAACP (1980) 444 U.S. 437 (dissenting from a dismissal of writs of certiorari as improvidently granted):

> "The pursuit of racial balance at any cost- the unintended legacy of Green- is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school-age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body. See Parents Assn. of Andrew Jackson High School v. Ambach, 598 F.2d 705, 717 (CA2 1979). The general quality of the schools also tends to decline when substantial elements of the community abandon

them." (Pp. 450-451)

3. Deprivation of vested rights. Plaintiffs' final argument against the application of Proposition 1 to this cause is that it wrongfully deprives minority children of their vested right to a desegregated education. We do not believe any pupil has a vested right to require other pupils to be assigned to public schools on the basis of race. The sole vested right involved, if that is the proper phrase, is the right of a pupil to receive an education which is not intentionally segregated and to attend a school where the school board has performed its duty to take all reasonable steps to alleviate segregation, regardless of cause. This right, recognized in Crawford, supra, has not been removed by Proposition 1, which does not purport to change the duty

imposed on a school board by California law to take all reasonably feasible steps to alleviate racial segregation in its schools regardless of cause. All the amendment does is remove from the courts the remedy of pupil school assignment and pupil transportation as one among scores of remedies available for use by a court to end racial isolation. Perhaps an illustration divorced from the emotional connotations attached to "busing" will clarify the point. Suppose a constitutional amendment had been adopted removing from the courts the authority to require use of magnet schools as a remedy for racial imbalance and racial isolation. (From time to time magnet schools are attacked as elitist institutions which drain away the brightest pupils from the regular schools, to the disadvantage of those

who are left.) A state policy against court-compelled use of magnet schools as a technique to alleviate racial imbalance contrary to state law might be ill-advised, but we do not believe a student could claim a federal consitutional right to attend a magnet school and a federal constitutional right to require a school district to operate one, even though a state court had written approvingly about the use of magnet schools as a desegregative technique in a desegregation action brought on behalf of the student. All that the constitutional amendment has done, both in the hypothetical case and in our real case, is to remove one remedy from future court enforcement of a state constitutional right. Prior to the passage of Proposition 1 no particular remedy had been ordered into effect by the California

Supreme Court, and no particular remedy had been mandated. We find the claim of vested right inapplicable.

In sum, article I, section 7(a), does not intentionally authorize or perpetuate segregation with discriminatory purpose. Nor does it remove the duty of a school board under state law to affirmatively address the problem of racial imbalance in the schools. It divests no vested rights. In requiring that remedial aspects of the duty to desegregate conform to the requirements of the Fourteenth Amendment as interpreted by the decisions of the United States Supreme Court, it merely provides a more precise contour to the duty established by California law and court decisions to desegregate public schools regardless of cause. (Cf. Brown v. Califano (1980) 627 F.2d 1221.) We

conclude that Proposition 1 does not violate the federal Constitution and that its application to this cause is constitutional under the Fourteenth Amendment.

The orders of May 19, 1980, and July 7, 1980, are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion. It is not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester. Our previous orders dated August 6, 1980, and September 4, 1980, staying certain features of the trial court's plan, are continued in force until further order of the

court.

CERTIFIED FOR PUBLICATION.

APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

Minutes of Division Two
January 14, 1981

Civil No. 60000

Crawford

vs.

Board of Education, etc.

The Court: Petition for rehearing denied.

APPENDIX B

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 11 1981

I have this day filed Order

HEARING DENIED

In re: 2 Civil No. 60,000

Crawford, etc., et al.

vs.

Bd. of Education of the City of Los Angeles

Respectfully,

Clerk

APPENDIX C

APPENDIX D

IN THE
Court of Appeal,
Second Appellate District
State of California

MARY ELLEN CRAWFORD, etc., et al., Plaintiffs and Respondents,	No. 60000 S.C. No. C 822854
vs.	REMITTITUR
BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Defendant and Appellant.	ON APPEAL FROM THE SUPERIOR COURT IN AND FOR THE COUNTY OF LOS ANGELES
BUSTOP, a Corporation; BETTER EDUCATION FOR STUDENTS TODAY, an Unincorporated Association; ROBERT LOVELAND and MARY KEIPP; CHARLES DREEBIN, etc., et al.; and UNITED TEACHERS/LOS ANGELES, an Unincorporated Association,	March 12, 1981

Intervenors.

The above-entitled cause having been fully argued, submitted and taken under advisement,

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the orders of May 19, 1980, and July 7, 1980, are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion. It is

not our intent to disrupt the operation of the schools during the present semester. Since our decision will not become final for thirty days, the parties have ample time to take whatever legal action they think desirable prior to the commencement of the next school semester. Our previous orders dated August 6, 1980, and September 4, 1980, staying certain features of the trial court's plan, are continued in force until further order of the court.
Appellant to recover costs.

I, CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the foregoing is a true copy of an original judgment entered on December 19, 1980 , and now remaining of record in my office.

Dated: MAR 12 1981 CLAY ROBBINS, JR., Clerk

By _____
Deputy

APPENDIX E

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES DEPT. EAST

Date: May 19, 1980 Judge HERBERT H. COX

Honorable: Paul Egly Judge Pro Tem Deputy Clerk

Honorable NONE Deputy Sheriff

Deputy Clerk _____

1 _____

NONE Reporter

(Parties and counsel checked if present)

C 822 854

Mary Ellen Crawford, etc. et al.,

vs.

Board of Education of the City of Los Angeles

Counsel for Plaintiff

Fred Okrand
Lynn Pineda
Joseph Duff
Mark Rosenbaum
Michael Bodaken
Anthony Rodriguez

NATURE OF PROCEEDINGS.

Lawrence B. Trygstad
Richard Schwab and
Janis Gordon for
INTERVENOR, UTLA

Brenda P. McKinsey
and Arthur Goldberg
for INTERVENOR,
INTEGRATION PROJECT

G. William Shea
David T. Peterson
Jerry Halverson
Peter James
Michael Johnson
Counsel for Defendant

AMICUS CURIAE,
John Caughey

Cliff Fridkis for
INTERVENOR, BUSTOP

(AO)

COURT'S MINUTE ORDER

(Please refer to attached order)

Dept.
EAST L

Minutes Entered
May 19, 1980
COUNTY CLERK

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARY ELLEN CRAWFORD, etc., et al., Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent.	Case No. C 822854 MINUTE ORDER

The board's motion of November 15, 1979, joined by Bustop, for modification of the court's orders of February 7, 1978, and May 30, 1979, to eliminate the portion of such orders requiring mandatory assignment of pupils for the purpose of desegregation is denied. The finding of this court in 1970 that the respondent board participated in racial discriminatory practices which led to the segregation of the Los Angeles Unified School District was expressly affirmed by the opinion of the

California Supreme Court in Crawford v. Board of Education, 17 Cal.3d 280 at p. 285:

> "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature."

The remedy required by Crawford is not inconsistent with the remedy required by the United States Supreme Court in Dayton Board of Education v. Brinkman, ___ U.S. ___, 61 L.Ed.2d 710, 99 S.Ct. 2971 (1979) and Columbus Board of Education v. Penick, ___ U.S. ___, 61 L.Ed. 666, 9 S.Ct. 2941 (1979), in similar findings and situations. To cite the history of judicial remedial desegregation orders where de jure acts have been found to cause school segregation requires citation to a myriad of federal cases. However,

reference is made to Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 L.Ed.2d 554, 91 S.Ct. 1267 (1971), as the definitive statement of remedies available to a federal court under the Fourteenth Amendment to the United States Constitution.

The provision under the so-called Robbins Amendment of Article 1, Section 7(a), of the California Constitution requiring modification of existing judgments and orders to conform to the federal cases and United States constitutional requirements would, even if constitutional, not change the terms of the mandate previously issued herein, as that mandate and the federal obligations under federal case law are not inconsistent and require identical remedies.

Petitioners in opposition seek to have the amendment to Article 1, Section 7(a) declared unconstitutional. The mandate in this case, as affirmed by the California Supreme Court, requires the same results as would be required under the same set of facts in the federal court decisions and the request for such declaration is moot and will be denied.

The motion by the board to strike the unofficial records and documents heretofore filed by the petitioners in opposition to modify is made moot by the above ruling.

Dated: June ___, 1981

PAUL EGLY, Judge of the Superior Court

APPENDIX F

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(Additional Attorneys listed on Page Two)

Attorneys for Petitioners

F I L E D
June 19, 1980
John J. Cocoran,
County Clerk
Herbert H. Cox,
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARY ELLEN CRAWFORD, a minor etc., et al., Petitioners, vs. BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, Respondent,	No. 822 854 PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW RE MINUTE ORDER OF MAY 19, 1980

APPENDIX F

BETTER EDUCATION FOR STUDENTS)
TODAY; BUSTOP, a corporation;)
CHARLES DREEBIN, et al.;)
ROBERT M. LOVELAND and)
MARY KEIPP,)
)
Intervenors.)

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Los Angeles, CA 90008
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MANNING, REYNOLDS & ROBERTS
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By motion filed November 15, 1979, during proceedings resulting from this Court's judgment of May 12, 1970 requiring the Los Angeles Board of Education to present to this Court by July 1, 1970 a Master Plan of Integration that would within a reasonable period of time effect a nondiscriminatory unitary school

system, respondent Board of Education moved the Court "pursuant to Article I, Section 7(a) . . . of the California Constitution," "as amended" by Proposition 1 on the Novebmer 6, 1979 California ballot, to modify this Court's orders of February 7, 1978 and May 30, 1979 so as to eliminate from said orders "those portions of the desegregation plan . . . which require the mandatory reassignment of pupils for the purposes of desegregation."

Petitioners, supported by intervenors Dreebin, et al, raised the issue as to the unconstitutionality of Proposition 1. Respondents. supported by intervenor Bustop, defended the constitutionality of the Proposition. Briefs supporting the differing points of view were filed by the parties and considered by the Court.

Following the completion, on April 11, 1980, of the proceedings mentioned in the first paragraph hereof, the Court, by way of a minute order dated May 19, 1980, denied respondent's motion and also declined on the ground of mootness, to pass upon the question of the constitutionality of Proposition 1.

Thereafter, respondent Board requested that there be findings of facts and conclusions of law with regard to said minute order. Pursuant to that request, the Court makes the following:

FINDINGS OF FACT

1. In its Findings of Fact and Conclusions of Law dated May 12, 1970, this Court found that respondent Board had been guilty of operating

intentionally, de jure and in bad faith a segregated school system.

2. The Court, therefore, on May 12, 1970, ordered the Board to prepare a desegregation plan which would desegregate the school system and make it a unitary system. This was to be done by July 1, 1970.

3. The Board did not comply with that order but instead appealed.

4. The California Supreme Court on June 28, 1976 affirmed this Court's order and remanded the case back to this Court for effectuation of the May 12, 1970 order. (Crawford v. Board of Education, 17 Cal.3d 280 [1976]).

5. The Board has not, even yet, complied with the said order. The Los Angeles School System during all those years has remained a segregated, not a unitary, system.

6. Following the aforesaid remand, the Board presented a plan to this Court which failed to comply with the writ of mandate and was so held by this Court. (Minute Order of July 5, 1977.)

7. The July 5, 1977 order required the Board to, within 90 days, present another plan to this Court which would comply with the writ of mandate and which would realistically commence the desegregation of the district by no later than February, 1978.

8. The Board failed to do so. Instead it presented a proposed plan (Exhibit 000 or Plan II) which this Court in the aforementioined February 7, 1978 order, held was not in compliance with the mandate but which this Court held was an important initial first step toward eventual compliance with the

writ. This plan contained some element of mandatory reassignment of students for desegregation purposes. Though held to be not consitutionally sufficient, this Court in the February 7, 1978 order permitted the Board to go forward with the partial and insufficient plan with the proviso that by December 31, 1978 the Board again present to the Court amendments and modifications to remedy the insufficiencies in order to complete "the [Board's] long delayed journey toward its stated goal of full racial integration of the district and . . . compliance with the court's mandate."

9. On March 16, 1979, respondent Board filed with the Court documents purporting to be in response to the February 7, 1978 order. Trial of the validity of the plan, consisting of that which the court had permitted to be

started by its February 7, 1978 order as modified by the Board's March 16, 1979 submission, was to begin on June 4, 1979.

10. Prior to June 4, 1979, respondent Board moved the Court for a continuance of that trial date. The motion was heard on May 30, 1979. It was pursuant to that hearing that the minute order of May 30, 1979 respondent Board seeks to modify was issued.

11. In said minute order of May 30, 1979, the trial date of June 4, 1979 was vacated. Trial eventually began on October 22, 1979 and completed on April 11, 1980 as above mentioned. As a condition of the vacation of the June 4, 1979 trial date, the May 30, 1979 order provided "because the Court . . . has not heard or listened to the amendments [to Plan II] and the objections thereto

. . . in order to maintain the status quo pending the continued hearing" that the Board "maintain the desegregation operation as nearly as possible without change pending the hearing." This continued in effect the mandatory assignments referred to above in Paragraph 8 of these Findings.

12. During the aforementioned trial, the Board abandoned its Plan II and the amendments and modifications thereto and sought leave to institute a so-called all-voluntary plan with no mandatory assignments for desegregation. In a separate order this Court has found that the so-called all-voluntary plan does not comply with the desegregation mandate of this Court.

13. As heretofore found, respondent Board has not yet complied with the 1970 order of this Court

requiring the Board to change the Los Angeles Unified School District from a segregated district to a unitary district. The district remains a segregated district.

14. Should any of the above findings of fact be deemed a conclusion of law, such conclusion of law is hereby made.

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Facially, Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution requires the California Courts to apply federal law in school desegregation cases.

2. A federal court order

requiring a school board which has been found guilty of operating de jure a segregated school system to desegregate the system and in so doing to employ mandatory non-neighborhood assignments, is within the power of the Court. (Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 [1971]).

3. A board of education which operated in the past a de jure segregated school system has been since that time and is now under a continuing federal constitutional duty to desegregate that segregated system. (Columbus Board of Education v. Penick, ___ U.S. ___, 61 L.Ed.2d 666, 99 S.Ct. 2941 [1979]; Dayton Board of Education v. Brinkman, ___ U.S. ___, 61 L.Ed.2d 710, 99 S.Ct. 2971 [1979]], If it has not done so, a federal court order

requiring it now to do so is within the power of the court. (Id.)

4. To the extent that this Court's order of February 7, 1978 and May 30, 1979 require the Los Angeles Board of Education to employ mandatory, non-neighborhood assignments as part of the methods of desegregating its de jure segregated system, such orders are within the meanings of the Swann, Penick and Brinkman cases, supra. Said orders are not, therefore, inconsistent with the amended Article I, Section 7(a) of the California Constitution, nor is this Court's order of May 12, 1970 nor that of the California Supreme Court of June 28, 1976. The remedy required by all is the same.

5. The provision of Proposition 1 requiring modification of existing judgments to conform to federal cases

and constitutional requirements, does not, therefore, change the previously issued mandate nor require any change in the orders made pursuant thereto.

6. Respondent Board's motion to modify the February 7, 1978 and the May 30, 1979 order should, therefore, be denied.

7. For like reason petitioners' request that Proposition 1 on the November 6, 1979 ballot amending Article I, Section 7(a) of the California Constitution, be declared unconstitutional should be denied as being moot.

8. Should any of these conclusions of law be deemed a Finding of Fact, such Finding of Fact is hereby made.

Dated: _____, 1980

_____

JUDGE, SUPERIOR COURT

APPENDIX G

EXAMPLES OF SOME OF CALIFORNIA'S DISCRIMINATORY TREATMENT OF ITS MINORITIES BOTH OVERTLY AND BY SEEMINGLY NEUTRAL ENACTMENTS

A. In General

California's intentional, de jure, and legislative history of discrimination against its minorities, particularly Black, Hispanic and Asian, the three major ethnic groups whose rights are involved in this case, is an unhappy, albeit well known, fact. It was brought to the attention of the courts below. CT 13970-13982. For instance, in 1850 the Legislature enacted a statute which provided that "no Black or Mulatto person or Indian, shall be allowed to give evidence in favor of, or against a white man." The California Supreme Court applied it to the Chinese. Accordingly the murder conviction of a white man was reversed because the witnesses against him were Chinese. People v. Hall, 4 Cal. 399 (1854).

Many other statutes specifically discriminated against the Chinese. See e.g., Ho Ah Kow v. Nunan, 12 Fed. Cas. 252 (C.C.D. Cal. 1979) (No. 6,546) (hairstyle); In re Parrott, 1 Fed. 481 (C.C.D. Cal. 1880) (employment); In re Lee Sing, 43 Fed. 359 (C.C.N.D. Cal. 1890) (prohibition against living in cities or specific areas therein); Yick Wo v. Hopkins, 118 U.S. 356, (1886) (laundry buildings).

Legislation also discriminated against the Japanese. See e.g., Poterfield v. Webb, 263 U.S. 225, (1923); Fujii v. California, 38 Cal.2d 718 242 P.2d 617 (1952); and Oyama v. California, 332 U.S. 633, (1948) (all concerning the ownership of land); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948) (prohibiting Japanese from earning a living by commercial fishing).

Court sanctioned restrictive covenants forbade blacks and other non-whites to live on the land they owned. E.g., Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P.896 (1920). Those and other governmental action helped create residentially segregated neighborhoods. E.g., Banks v. Housing Authority, 120 Cal.App.2d 1, 260 P.2d 668 (1953).

Mexicans also were the object of restrictive covenants. E.g., Declaration of Conditions and Restrictions Governing Tract No. 11703, Los Angeles County (1945), quoted in I. Hendrick. The Education of Non-Whites in California, 1849-1970, page 86 (1977). They were excluded from places of public accommodation or allowed in only at certain times. "Satistics 1942," Report of Edward D. Ayres, Foreign Relations Division, Los Angeles County Sheriff's Office, p.2, quoted in Hendrick, supra, at 99.

California's anti-miscegenation statute was not struck down until 1948. Perez v. Sharp, 32 Cal.2d 711, 198 P.2d 17.

B. Discriminatory Ballot Measures

Proposition 14 on the 1964 ballot was held unconstitutional in Reitman v. Mulkey, 487 U.S. 369 (1967) It provided:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses.

Proposition 21 on the 1972 ballot was held unconstitutional in pertinent part in Santa Barbara School District v. Superior Court, 13 Cal.3d 315, 530 P.2d 605 (1975). The portion struck down provided:

> No public school student shall, because of his race, creed or color, be assigned to or be required to attend a particular school.

C. Segregatory Legislation as to the Public Schools

All this was brought to the attention of the courts below. CT 13983-13992

For greater detail, see Hendrick, supra, passim, and C. Wollenberg, All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975 (1976).

For example, the California School Census Act of 1855 provided that the apportionment of the state school fund to the several counties was to be made "in proportion to the number of white children as shown by the census taken by the school marshals." Hendrick at 7. Thus, the education of non-whites was explicitly inhibited because no money was received for their attendance. As the first active State Superintendent explained in lashing out against "the Negrophilist school of mock philanthropists" who sought to "introduce children of Negroes into our public schools" (Hendrick at 8):

> Until our people are prepared for practical amalgamation, which will probably not be before the mellenium, they will rather forego the benefits of our Schools than permit their daughters -- fifteen, sixteen and seventeen years of age

> plus to affiliate with the sons of Negroes. It is practically reduced to this, then, that our Schools must be maintained exclusively for white, or they will soon become tenanted by blacks alone.

Legislation in 1860 and 1863 allowed, but did not require, districts to establish separate schools for Negroes, Asians and Indians (Hendrick at 16), but it provided serious retribution in the form of lost revenue to those districts which did admit children of those races. (E.g. Cal. Stats. 1863, ch. 159, §68.)

The fourth State Superintendent, while acknowledging that black children were entitled to education, came down squarely for segregation (Hendrick at 16):

> The parents of colored children are taxed, and it is just that some provision should be made for their education; but the law requires, and public opinion demands that they should be educated in separate schools.

Black children were accordingly segregated. For instance, San Francisco Board of Education, Regulation 117, provided: "Separate Schools - Children of African or Indian descent shall not be admitted into schools for white children, but separate schools shall be provide for them in accordance with the

California School Law." See Ward v. Flood, 48 Cal. 36, 45 (1874). The local schools superintendent himself characterized the minority school as inferior. Hendrick at 18-19.

The Revised School Law of 1866 provided that local school boards might admit into schools for whites "half-breed Indian children and Indian children who live with white families or under guardianship of white persons." Id. at 16. Nonetheless, the California Supreme Court sustained separate schools for blacks and sanctioned the conduct of school boards refusing admission of blacks to white schools even while maintaining a neighborhood school attendance policy. Ward v. Flood, supra. In so doing, the Court called attention to the state statute (Acts 1869-70, §56) which provided that "the education of children of African descent, and Indian children, should be provided for in separate schools". Id. 48 Cal. at 48. The absence of provision for the education of Chinese children meant that school districts were relieved of all responsibility to educate such children, even in separate schools. And they were, indeed, excluded. Hendrick at 25, 32.

The Los Angeles Board of Education also participated in deliberate segregation. Here, "segregation was a way of life." Hendrick at 22.

The Los Angeles Board cooperated with white parents in establishing and maintaining black schools. Hendrick at

92-99, 102. The author concludes id. at 92): "School attendance zones already contributed to the definition of neighborhoods. . . Although Los Angeles school officials never agreed publicly to segregation, they did cooperate in seeing that segregation was accomplished, usually in the interest of maintaining community harmony."

On September 27, 1906, a separate "Oriental School" was established in San Francisco and the city principles were directed to send all Chinese, Japanese and Korean children to that school. Hendrick at 39.

Native Americans, like Blacks and Asians, were officially marked as an inferior race. Id. at 43. In 1860, legislation denied the use of state funds for the education of all racial minorities, including Indians. Id. Later, in 1864, legislation provided that district school trustees "shall establish" separate schools for Negores, Mongolians and Indians when parents or guardians of ten or more such children petitioned the Board in writing. The chance of Indians being able to meet such requirements was nil. Id. at 43. Even with encouragement and pressure from the federal government in the form of monetary incentives, public schools were reluctant to admit Indian children. Hendrick at 53. It took a court battle to admit Indian children living on reservations, even though no separate schools had been established for them. Piper v. Big Pine School District, 193 Cal. 664, 226 P. 926 (1924).

Legislative sanction to require "non-American" Indians, Chinese, Japanese and Mongolian children to attend separate schools (Education Code §§8003 and 8004) was not repealed until 1947. (Cal.Stats. 1947, ch. 737, §1)

Despite the Mexican heritage of California, purposeful discrimination against Mexican children was rampant. "Respectable politicians and citizens could not face up squarely to the overt segregation of Mexican immigrants and the children of Mexican immigrants. The problem was one of maintaining the segregation of Mexican children, some of whom were natural born citizens of the United States, without appearing to discriminate against them." Hendrick at 56. The Los Angeles Board of Education, though it resisted white parents' pressure to segregate Mexican school children at first, succumbed by 1923. The Pasadena School Board had already done so. Hendrick at 82-92. Other school districts similarly accommodated. Id. at 100.

Section 3.3 of the School Code provided:

> "The governing board of the school districts shall have power to establish separate schools for Indian children, excepting children of Indians who are wards of the United States government and children of all other Indians who are descendants of the original American Indians of the United States, and for

children of Chinese, Japanese or Mongolian parentage."

Thus the statute accomplished the task of discriminating against Mexican children without saying so, naming Indians directly while releasing "American" Indians from legally mandated segregation (because of pressure from the Office of Indian Affairs of the United States government) and continuing the discrimination against the Chinese, Japanese, and other Asians. See Hendrick at 57. Segregation of Mexican school children remained legal until the courts ruled it unconstitutional after World War II. Westminster School District of Orange County v. Mendez, 161 F.2d 774 (9th Cir. 1947).

Efforts to maintain school segregation are not limited to the distant past. In the last decade, the Legislature and the electorate each undertook to preserve segregation in California schools.

In 1970, the State Legislature enacted Section 1009.5, now Section 35350 of the Education Code, which reads: "No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." See also Section 72209 (similar provision for minors attending community colleges). The transparent purpose of the provision was to thwart, by parental veto, mandatory

desegregation assignments. San Francisco Unified School District v. Johnson, 3 Cal.3d 933, 958 supra. To avoid such an unconstitutional result, the California Supreme Court construed the statute to mean only that a school board may not require a student to board a bus to get to school. That is, a board may not engage in "forced busing," but it may, and always has had the prerogative to, assign students for desegregation purposes.

The 1972 efforts by the voters to stop desegregation by adopting Proposition 21 on the November 7 ballot was mentioned above.

D. The Ballot argument on Proposition 1, made clear the purpose of the measure was to halt the ongoing desegregation in Los Angeles

E.g. "Proposition 1 does everything the people of California may legally do to stop court ordered forced busing in Los Angeles and in all other California school districts." (CT 14269)

E. The media message was to the same effect

Typical comments were (CT 13996,

14000, 14001 14004):

> "[A] twice-defeated measure introduced to overturn school integration programs in Los Angeles and some other cities easily cleared a Senate committee Wednesday."
>
> "The measure, aimed primarily at overturning the court-ordered integration program in Los Angeles, has qualified for the June 1980 ballot." [A special proceeding accelerated that time to the November, 1979 ballot]
>
> "It (Proposition 1) is aimed primarily at overturning Los Angeles massive, school integration program, now in its second year."
>
> "Proposition 1 . . . the Amendment sponsord by Senator Alan Robbins of Van Nuys, is obviously designed to end busing for integration in Los Angeles."
>
> "Proposition was drafted to stop Los Angeles' court ordered busing..."